93-583

SUPREME COURT, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1993

DiCARLO CONSTRUCTION COMPANY, and
DELTA EQUIPMENT COMPANY,

Petitioners,

v.

H. H. ROBERTSON CO.,
CUPPLES PRODUCTS DIVISION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do post-judgment collection procedures violate constitutional rights of due process when a creditor may enforce a judgment against a person who was not a party to the action in which the judgment was obtained, when the creditor is not required to sue the non-party or serve the non-party with process in the post-judgment collection action, and when the non-party is required to voluntarily intervene in the collection action in which he has not been sued in order to present his position on the merits?

LIST OF PARTIES AND RULE 29.1 LIST

The parties in the proceeding below were respondent H. H. Robertson Co., Cupples Products Division, as plaintiff, and V. S. DiCarlo General Contractors, Inc., as defendant. H. H. Robertson Co., Cupples Products Division, was allowed to enforce its judgment against petitioners DiCarlo Construction Company and Delta Equipment Company, who were not parties in the trial court.

H. H. Robertson Co., Cupples Products Division is an inactive corporation. On November 8, 1990, H. H. Robertson Co., Cupples Products Division, merged with an active corporation, Robertson-Ceco Corporation, which has no parent or subsidiary companies to the best of petitioners' knowledge.

DiCarlo Construction Company is a partnership with the following corporations as general partners: D-1 Constructors, Ltd.; D-2 Constructors, Ltd.; D-3 Constructors, Ltd.; D-4 Constructors, Ltd.; D-5 Constructors, Ltd.; and D-6 Constructors, Ltd. DiCarlo Construction Company has no parent or subsidiary companies.

Delta Equipment Company is a corporation with no parent or subsidiary companies.

V. S. DiCarlo General Contractors, Inc. was a corporation with no parent or subsidiary companies. On December 17, 1991, V. S. DiCarlo General Contractors, Inc. changed its name to Builders Equipment Company, a corporation with no parent or subsidiary companies.

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OPINIONS BELOW

The pertinent opinions below are included in the Appendix, pages 29-35, 54-56, 74-79. The District Court's opinion of April 15, 1992 is reported at 789 F.Supp. 998 (E.D.Mo. 1992), and is reprinted in the Appendix, pages 29-35. The District Court's opinion of May 11, 1992 is not reported and is reprinted in the Appendix, pages 54-56. The Court of Appeals' opinion of May 28, 1993 is reported at 994 F.2d 476 (8th Cir. 1993), and is reprinted in the Appendix at pages 74-79.

JURISDICTION

On May 28, 1993, the United States Court of Appeals for the Eighth Circuit issued its opinion affirming the opinion of the United States District Court for the Eastern District of Missouri. On July 13, 1993, the Court of Appeals entered its order denying petitioners' Motion for Rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment Fourteen, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

V. S. DiCarlo General Contractors, Inc. entered into a contract in 1986 with H. H. Robertson Co., Cupples Products Division (herein "Cupples"), for Cupples to perform

subcontract work for the construction of an office building in Kansas City, Missouri, known as Two Pershing Square. On May 31, 1988, Cupples filed suit in the United States District Court for the Eastern District of Missouri against V. S. DiCarlo General Contractors, Inc. only. The basis for federal jurisdiction for this action is 28 U.S.C. §§ 1332(a)(1) and 1332(c). The jury entered a verdict in that case in favor of Cupples, and judgment was entered on July 2, 1990 against V. S. DiCarlo General Contractors, Inc. in the amount of $373,039.46 on Cupples' breach of contract claim. (Appendix, pages 1-2). This judgment was affirmed on appeal, *H.H. Robertson Co., Cupples Products Division v. V.S. DiCarlo General Contractors, Inc.*, 950 F.2d 572 (8th Cir. 1991), which is a decision not at issue in this Petition.

One year later, on July 1, 1991, Cupples filed a Motion for Creditor's Bill in Equity against V. S. DiCarlo General Contractors, Inc. only, seeking to execute on its judgment. (Appendix, pages 3-5). In this Motion, Cupples sought to execute on its judgment against the assets of DiCarlo Construction Company and Delta Equipment Company, two companies who were not named as parties or served with process in either the original action or in the Motion for Creditor's Bill in Equity proceeding. (Appendix, pages 1-5, 54). V. S. DiCarlo General Contractors, Inc. filed a Motion to Dismiss, arguing that Cupples needed to join DiCarlo Construction Company and Delta Equipment Company as necessary parties. (Appendix, pages 6-16).

On September 30, 1991, Cupples mailed garnishment interrogatories with summons to DiCarlo Construction Company and Delta Equipment Company, who answered

by stating that they did not possess any assets of V. S. DiCarlo General Contractors, Inc. (Appendix, pages 17-28). Cupples did not file any exceptions to these answers.

On April 15, 1992, the District Court issued its opinion sustaining Cupples' Motion for Creditor's Bill in Equity, holding that Cupples' judgment against V. S. DiCarlo General Contractors, Inc. could be enforced against DiCarlo Construction Company and Delta Equipment Company. *H.H. Robertson Co., Cupples Products Division v. V.S. DiCarlo General Contractors, Inc.*, 789 F.Supp. 998 (E.D.Mo. 1992) (Appendix, pages 29-35). V. S. DiCarlo General Contractors, Inc. filed a Motion to Vacate on April 28, 1992, raising the issue that the District Court's opinion violated constitutional due process requirements as neither DiCarlo Construction Company nor Delta Equipment Company were ever joined as parties or given notice or a hearing on the merits. (Appendix, pages 36-44). On April 29, 1992, DiCarlo Construction Company and Delta Equipment Company filed a Motion to Intervene and a Motion to Quash Execution and Garnishment in Aid of Execution. (Appendix, pages 45-53). The District Court denied these three Motions in its unreported order of May 11, 1992. (Appendix, pages 54-56).

DiCarlo Construction Company and Delta Equipment Company filed an appeal to the United States Court of Appeals for the Eighth Circuit. In their briefs, DiCarlo Construction Company and Delta Equipment Company argued that the District Court's orders were contrary to constitutional due process requirements. (Appendix, pages 57-73). The Court of Appeals affirmed the District Court's decision in its opinion of May 28, 1993. *H.H.*

Robertson Co., Cupples Products Division v. V.S. DiCarlo General Contractors, Inc., 994 F.2d 476 (8th Cir. 1993). (Appendix, pages 74-79).

DiCarlo Construction Company and Delta Equipment Company filed a Petition for Rehearing, arguing that the Court of Appeals' opinion was contrary to constitutional due process requirements. (Appendix, pages 80-87). The Court of Appeals denied the Petition for Rehearing on July 13, 1993. (Appendix, pages 88-89).

REASON FOR GRANTING THE WRIT

I. The Court of Appeals' decision holding that procedural due process is irrelevant to equitable post-judgment collection remedies is contrary to the decisions of four Courts of Appeals and presents the Court with the opportunity to establish due process principles in this area.

This case involves fundamental issues of procedural due process for post-judgment debtors and provides an opportunity for this Court to overrule *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924). The decision of the United States Court of Appeals for the Eighth Circuit states that petitioners' due process arguments are irrelevant as equitable post-judgment remedies do not involve issues of due process. The Court of Appeals' decision is contrary to decisions extending due process protections to post-judgment debtors by four Courts of Appeals, in *Aacen v. San Juan County Sheriff's Department*, 944 F.2d 691 (10th Cir. 1991); *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985); *Dionne v. Bouley*, 757 F.2d 1344 (1st

Cir. 1985); and *Finberg v. Sullivan*, 634 F.2d 50 (3rd Cir. 1980).

The Court of Appeals' decision is also contrary to the due process protections afforded non-parties against whom a judgment is sought to be applied on the basis of an alter ego theory. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969). Also, the Court of Appeals' decision is contrary to the constitutional right to not voluntarily intervene in a case in which one has not been sued or served with process. *Martin v. Wilks*, 490 U.S. 755, 763-65 (1989).

This case presents the Court with the opportunity to overrule *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924), which indicated that procedural due process was not required in post-judgment collection procedures. Justice Douglas' dissent in *Hanner v. DeMarcus*, 390 U.S. 736 (1967) called *Endicott-Johnson* into question and indicated that the later cases such as *Griffin v. Griffin*, 327 U.S. 220 (1946) may have set the stage for overruling *Endicott-Johnson*. Four Courts of Appeals, several District Courts and commentators have joined Justice Douglas in questioning the continuing viability of *Endicott-Johnson*.[1]

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[1] *Aacen*, at 695-9; *McCahey*, at 457-50; *Dionne*, at 1350-2; *Finberg*, at 56-8; *Kirby v. Sprouls*, 722 F.Supp. 516 (C.D. Ill. 1989); *Burris v. Mahaney*, 716 F.Supp. 1051 (M.D. Tenn. 1989); *Follette v. Vitanza*, 658 F.Supp. 492 (N.D. N.Y. 1987); *Davis v. Paschall*, 640 F.Supp. 198 (E.D. Ark. 1986); R. Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and its Progeny*, 65 Geo.L.J. 1 (1976); D.W. Dunham, *Post-judgment Seizures; Does Due Process Require Notice and Hearing*, 21 S.D.L.Rev. 78 (1976); Comment, *Postjudgment Garnishment in Georgia: Acting Largely in the Dark*, 12 Ga.L.Rev. 60 (1977);

This case squarely presents the issue of whether a state's equitable post-judgment collection procedure may contain no due process safeguards, and this Court has the opportunity to address the widespread doubts about the withholding of procedural due process in *Endicott-Johnson*.

In this case, Cupples sought to enforce its judgment against non-parties DiCarlo Construction Company and Delta Equipment Company through a Missouri equitable remedy, the creditor's bill in equity. There are no statutes addressing this remedy. The procedures for a creditor's bill in equity are contained only in case law. In every reported case before this one, the creditor filing the bill in equity proceeding named as a party the non-party against whom execution was desired and served the non-party with process. *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922 (Mo. App. 1989); *Peerless Industries, Inc., v. Estes*, 779 S.W.2d 332 (Mo. App. 1989); *General Grocer Co., v. Ahlemeier*, 627 S.W.2d 61 (Mo. App. 1981); *Eugene Alper Construction Co., Inc., v. Joe Garavelli's of West Port, Inc.*, 655 S.W.2d 132 (Mo. App. 1983); *Runnion v. Paquet*, 233 S.W.2d 803 (Mo. App. 1950).

For example, in *Shockley*, creditor Frank W. Shockley sought to enforce his judgment against Harry A. Sander Realty Company by executing against Harry A. Sander individually and Middlewest Realty, Inc. The Court noted that Shockley filed his creditor's bill in equity lawsuit against Mr. Sander individually and Middlewest, naming

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Note, *Pennsylvania's Postjudgment Garnishment Procedures Violate the Due Process and Supremacy Clauses*, 26 Vill.L.Rev. 579 (1980).

Sander and Middlewest as parties in his initial motion for creditor's bill. *Id.*, at 923-24. As noted in petitioners' Petition for Rehearing, the Court of Appeals erroneously interpreted the *Shockley* case on this point, as Court of Appeals addressed only the naming of a non-party in the original action, not in the subsequent creditor's bill in equity action. (Appendix, pages 81-82).

DiCarlo Construction Company and Delta Equipment Company became aware of Cupples' Motion for Creditor's Bill in Equity action but never were named as parties or served with process in that proceeding, contrary to the procedures in every reported case. DeCarlo Construction Company and Delta Equipment Company chose not to surrender their right to not voluntarily intervene in an action in which they had not been sued or served. *Martin v. Wilks*, 490 U.S. 755, 763-65 (1989).

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief must be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. *Id.*, at 765.

The Court of Appeals erred in affirming the District Court's disregard of this right of DiCarlo Construction

Company and Delta Equipment Company to not intervene. The District Court held that DiCarlo Construction Company and Delta Equipment Company were alter egos of V.S. DiCarlo General Contractors, Inc. DiCarlo Construction Company and Delta Equipment Company strenuously deny this finding, but were never given an opportunity for a hearing on the merits to present the facts which disprove the alter ego allegations.

DiCarlo Construction Company and Delta Equipment Company thus had no legally effective notice of Cupples' Motion for Creditor's Bill in Equity proceeding and no opportunity to be heard on the merits. The Court of Appeals' decision affirms the District Court's destruction of these fundamental due process rights to not voluntarily intervene and to have notice and a hearing.

Particularly troublesome is the Court of Appeals' language that due process rights in a post-judgment execution action are irrelevant simply because certain legal authorities do not specifically discuss equitable post-judgment remedies like the creditor's bill. (Appendix, page 78) As discussed above, four Courts of Appeals have specifically held that due process requirements apply to post-judgment collection remedies and the Court of Appeals' decision in this case distinguishes away fundamental constitutional rights on the basis of a narrow reading of particular cases without considering the general importance of due process protections.

The Court of Appeals erroneously interpreted the effect of the sending of garnishment interrogatories to DiCarlo Construction Company and Delta Equipment

Company. The Court of Appeals held that this was sufficient notice to meet due process requirements. The Court of Appeals ignores the fact that under Missouri law, the mere service of garnishment interrogatories does not create any legal cause of action.

Pursuant to Rule 90.13(c)[2], Missouri Rules of Civil Procedure, "the garnishor may file exceptions to the answers, asserting any ground upon which recovery is sought against the garnishee". (Appendix, page 90) The garnishee may respond to the exceptions. Rule 90.13(d). The parties are then entitled to a trial on the issues raised by the exceptions and responses. Rule 90.13(e). (Appendix, page 90).

> In garnishment cases, the summoning of the garnishee, and the propounding of the interrogatories to him and his answer thereto, are merely the preliminaries to the making up of the issues between plaintiff and the garnishee. When the latter answers saying he has no money or property of the defendant, the denial of the plaintiff is the foundational pleading on which his cause of action against the garnishee rests. The issues are made up, not by the interrogatories and answer, but by the denial and reply.

Landmark Bank of Ladue v. General Grocer Co., 680 S.W.2d 949, 953 (Mo. App. 1984).

The Court of Appeals also erroneously states that proper notice was provided because Cupples mailed the

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[2] Under Rule 69(a), Fed.R.Civ.P., execution proceedings are governed by Missouri practice and procedure.

garnishment interrogatories to counsel for DiCarlo Construction Company and Delta Equipment Company. Service of initial process cannot be made upon an attorney under Missouri law. *Gothard v. Spradling*, 586 S.W.2d 443, 446 (Mo.App. 1979); *In re Riverfront Food and Beverage Corp.*, 29 B.R. 846 (Bankr. E.D. Mo. 1983).

The Court of Appeals' utter disregard for due process rights reveals that guidance from this Court is needed for future courts and parties regarding due process issues in post-judgment collection procedures. While four Courts of Appeals have recognized due process safeguards in this situation, this Court has not ruled on this issue since the frequently criticized *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924). This case presents the Court with the opportunity to overrule *Endicott-Johnson* and to establish due process principles in this area for the benefit of future courts and parties. In addition, this Court should provide relief to DiCarlo Construction Company and Delta Equipment Company from the erroneous decision of the Court of Appeals.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON CO., CUPPLES PRODUCTS DIV., Plaintiff,	)	No. 88-1059C (6)
vs.	)	
V.S. DiCARLO GENERAL CONTRACTORS, INC., Defendant.	)	

JUDGMENT

(Filed July 2, 1990)

This action was tried before the Court and a jury, Honorable George F. Gunn, Jr., District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdicts;

It is ORDERED and ADJUDGED that on plaintiff's breach of contract claim, the plaintiff, H.H. Robertson Co., Cupples Products Div., recover of the defendant, V.S DiCarlo General Contractors, Inc., the sum of THREE HUNDRED SEVENTY THREE THOUSAND THIRTY-NINE DOLLARS AND FORTY-SIX CENTS ($373,039.46) with interest thereon at the rate of 8.09% per annum and costs.

It is FURTHER ORDERED and ADJUDGED that on plaintiff's quantum meruit claim, the plaintiff, H.H. Robertson Co., Cupples Products Div., recover of the defendant, V.S. DiCarlo General Contractors, Inc., the

sum of TWENTY FIVE THOUSAND SIX HUNDRED SIXTY-FOUR DOLLARS AND NINETY-FOUR CENTS ($25,664.94) with interest thereon at the rate of 8.09% per annum and costs.

It is FURTHER ORDERED and ADJUDGED that the counterclaim plaintiff, V.S. DiCarlo General Contractors, Inc., take nothing on the counterclaim, that the action be dismissed on the merits, and that the counterclaim defendant, H.H. Robertson Co., Cupples Products Div., recover its costs of action.

Dated at St. Louis, Missouri
this 2nd day of July, 1990.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION, Plaintiff,	)	Case No. 88-1059-C-6
v.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	

MOTION FOR CREDITOR'S BILL IN EQUITY

Pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and pursuant to the practice and procedure of the State of Missouri relating to proceedings in aid of execution, which is made applicable in this Court by Rule 69, plaintiff H.H. Robertson Company, Cupples Products Division, moves that the Court permit it to proceed by way of a creditor's bill in equity to satisfy the judgment in this case from property of the judgment debtor, V. S. DiCarlo General Contractors, Inc., which is not subject to execution by the normal means available at law because it is in the hands of certain alter ego entities. Plaintiff has no adequate legal remedy. Further grounds supporting

the use of a creditor's bill in these circumstances are set forth in the memorandum in support submitted herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were mailed, first class, postage prepaid, this _____ day of June, 1991, to the following counsel:

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Delta Equipment Company

/s/ Charles Weiss

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

H.H. ROBERTSON, CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	Case No.
v.	)	88-1059-C-6
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S MOTION FOR CREDITOR'S BILL IN EQUITY

COMES NOW defendant and moves the Court pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, to dismiss plaintiff's Motion for Creditor's Bill in Equity.

As grounds for said motion, defendant states as follows:

1. Plaintiff's Motion for Creditor's bill in Equity fails to state a claim upon which relief can be granted.

2. It appears from plaintiff's Motion and its Memorandum in Support of the Motion that plaintiff intends to proceed against property belong to DiCarlo Construction Company and Delta Equipment company, which are not parties to this action.

3. The matters which plaintiff apparently seeks to raise by way of its Motion for Creditor's Bill in Equity have been and are the subject to proceedings in the Circuit Court of Jackson County, Missouri, entitled *H.H. Robertson Company v. V.S. DiCarlo General Contractors, Inc.*

v. Delta Equipment Company, Case No. CV91-2771, Execution No. EK91 0122, and *Delta Equipment Company v. Robertson-Ceco Corporation*, Case No. CV91-15391. Allowing plaintiff to pursue such claims in this action would be unnecessary, wasteful, and duplicative, and would create the potential for inconsistent and conflicting determinations of the same issues by the Jackson County Court and by this Court. Plaintiff has elected to proceed in the Circuit Court of Jackson County and should be required to pursue its available remedies under state law there.

4. The facts in support of the Motion, and the grounds therefor, are set forth more fully in the Memorandum in Support of this Motion and the Affidavit of Stephen C. Caruso, filed herewith.

WHEREFORE, defendant moves the Court to dismiss plaintiff's Motion for Creditor's Bill in Equity.

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CERTIFICATE OF MAILING

A copy of the above and foregoing pleading was mailed, postage prepaid, on the 21st day of August, 1991 to: Charles A. Weiss and Douglas W. King, 500 N. Broadway, St. Louis, MO 63101; and Stephen C. Caruso, 5600 N.E. Antioch Road, Kansas City, MO 64119.

/s/ Ernest H. Fremont
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

H.H. ROBERTSON, CUPPLES PRODUCTS DIVISION, Plaintiff,	)	Case No. 88-1059-C-6
v.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S MOTION FOR CREDITOR'S BILL IN EQUITY

INTRODUCTION

This Court granted judgment upon the jury's verdict in this action on July 2, 1990 in favor of plaintiff ("Robertson"). Defendant ("VSDGC") filed timely notices of appeal and the appeal is presently pending before the Eighth Circuit.

Notwithstanding the pendency of the appeal, Robertson has made aggressive efforts to pursue execution on the judgment. As reflected by the affidavit of Stephen C. Caruso, filed herewith (hereinafter, the "Caruso Affidavit"), Robertson has commenced execution proceedings in the Circuit Court of Jackson County, Missouri and has wrongfully seized property there. In doing so, it has seized property belonging to Delta Equipment Company ("Delta") (Caruso Affidavit, paragraph 2).

As a result, Delta filed a Motion to Quash the execution pursuant to Rule 76.25 of the Missouri Rules of Civil Procedures, and on May 16, 1991, after an evidentiary hearing, the Circuit Court of Jackson County determined that Delta was in fact the owner of such equipment and ordered its return to Delta. (Caruso Affidavit, paragraphs 3 and 4). Delta has filed suit against Robertson in the Circuit Court of Jackson County, Missouri for conversion of the subject equipment (The "Delta suit"). (Caruso Affidavit, paragraph 5). Robertson, in turn, has filed an Answer and Counterclaim to the conversion suit alleging, *inter alia*, the making of fraudulent conveyances and transfers of property by VSDGC to Delta "and other related entities", allegedly in violation of § 428.020 RSMo. (Caruso Affidavit, paragraph 6). The Delta suit, and Robertson's counterclaim therein are pending at this time. (Caruso Affidavit, paragraph 7).

Notwithstanding the fact that Robertson has already commenced proceedings in the Circuit Court of Jackson County to enforce the judgment herein during the tenancy of the appeal, and is litigating its allegations of fraudulent conveyances in the Delta suit, it has also filed a Motion for Creditor's Bill in Equity in this action.

DISCUSSION

A. The Motion for Creditor's Bill in Equity Fails to State a Claim Upon Which Relief can be Granted.

Under Missouri law, a creditor's bill is defined as an action, " . . . to enforce the payment of debts out of equitable assets which cannot be reached by levy and sale on execution at law." *Publicity Building Corporation v. Thomann*, 353 Mo. 493, 183 S.W.2d 69, 72 (1944). It may be brought to set aside a transfer from the ground of fraud, or to discover hidden assets. *State ex. rel. Brigance v. Smith*, 345 Mo. 793, 135 S.W.2d 922, 924 (Mo. App. 1989). It is " . . . an independent and separate proceeding which may be instituted in any court having jurisdiction to entertain it, whether or not it is the same court that entered the original judgment." 21 *Am. Jur.* 2d, "Creditor's Bills," § 65, p. 53. Whether in an ancillary proceeding to the action in which the judgment was rendered, or in a separate action, the party seeking relief must allege facts which, if true, are "sufficient to state a claim upon which equitable relief may be granted . . . " *Shockley v. Harry Sander Realty Co., supra.*, at 924.

Plaintiff's Motion fails to state any legally cognizable claim for relief, against any party, on any theory. The Motion merely states that plaintiff, " . . . moves that the Court permit it to proceed by a way of a creditor's bill in equity to satisfy the judgment in this case from property of the judgment debtor, V.S. DiCarlo General Contractors, Inc., which is not subject to execution by normal means available at law because it is in the hands of certain alter ego entities". There is also a conclusory allegation that

plaintiff lacks an adequate remedy. No claim for relief of any kind or nature is stated.

Plaintiff's Memorandum in support of its Motion consists of eleven pages of selective, argumentative and, in many respects, inaccurate characterizations of the trial record and post judgment discovery conducted by plaintiff, plus six pages of citations to cases discussing the availability of relief by way of a creditor's bill in equity under Missouri law, and cases discussing the alter ego theory for disregard of the corporate entity. None of this is sufficient to state a claim upon which relief can be granted.

As the authorities make clear, a creditor's bill is a form of action in equity which allows a plaintiff, *upon a proper showing,* to enforce a judgment against a party other than the party against whom the original judgment was obtained. It does not dispense with the necessity for pleading, and proving, facts sufficient to allow such recovery.

Plaintiff cites cases in its Memorandum applying the alter ego theory, but nowhere pleads any facts sufficient to allow it to recover on that basis. Under that theory, there must be complete domination as to the transaction in question, fraud or in best result from the use of such control, and the plaintiff's injury must be a proximate result of the control and the breach of duty of the dominating corporation. *National Bond Finance Company v. General Motors Corporation,* 238 F.Supp 248 (W.D. No. 1964), *aff'd,* 341 F.2d 1022 (8th cir. 1965). It is not enough to show that one corporation is the adjunct or instrumentality of another and that both are under the control of the same

person; in the absence of proof of any improper purpose, recovery on the alter ego theory is unavailable. *Cater v. Matthey Laundry and Drycleaning Company*, 330 S.W.2d 771, 777 (Mo. 1959); *Pasta House Company v. Miller*, 691 S.W.2d 460, 463 (Mo. App. 1985). If the purpose to be served by the arrangement is fair and lawful, then legal forms and relationship are to be observed and the case determined upon the basis separate and individual corporate existence. *Camelot Carpets v. Metro Distributing Co.*, 607 S.W.2d 746, 749-50 (Mo. App. 1980). Alternatively, to proceed on a fraudulent conveyance theory, plaintiff must plead and prove facts sufficient to give rise to a presumption that a transfer was fraudulent. *Publicity Building Corporation v. Thomann, supra.*, 183 S.W.2d at 72.

Creditor's bills are unquestionably a recognized form of relief under Missouri law. They do not, however, relieve plaintiff of the necessity to state a claim upon which such relief can properly be granted. As is true of any other pleading which fails to do so, plaintiff's Motion for a Creditor's Bill in Equity must be dismissed.

B. The Motion for Creditor's Bill in Equity Fails to Join Necessary Parties.

As a creditor's bill in equity does not dispense the need for pleading facts sufficient to show a claim for relief, so also does it not dispense with the necessity for joinder of all parties whose interest is thereby affected. It has been said that a creditor's bill is considered the equitable equivalent of garnishment or execution. *United States ex. rel. Goldman v. Meredith*, 596 F.2d 1353, 1357 (8th

Cir. 1979); *Shockley v. Harry Sander Realty Co., supra*, plaintiff joined the alleged alter egos as garnishees and was allowed to proceed against them as such in equity under a creditor's bill. Here, no effort has been made to join any other party as a garnishee, or in any capacity. Accordingly, there is no basis upon which plaintiff could proceed against the non-parties, even if a claim for relief was stated (which, as discussed above, is not).

Plaintiff's motion fails altogether to identify any party from whom it would seek relief by way of a creditor's bill. In its Memorandum in support of the Motion, plaintiff inaccurately asserts that the record herein demonstrates that assets of defendant have been transferred to DiCarlo Construction Company ("DCC") and Delta. Neither of these entities was a party to the proceedings prior to judgment, and no effort has been made to join them in any post-trial proceedings.

Rule 19(a), F.R.C.P. requires that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party if, *inter alia*, the person's claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest. DCC and Delta unquestionably have an interest in the property which plaintiff seeks to reach by way of a creditor's bill in equity, and disposition of the action in their absence will certainly, "as a practical matter," impede their ability to protect that interest. In the absence of all necessary parties, no relief affecting their interests can be awarded.

C. The Subject Matter of Plaintiff's Motion for Creditor's Bill in Equity is the Subject of Pending Litigation.

Relief by way of creditor's bill is appropriate only upon showing by the judgment creditor that he has no adequate legal remedy. *United States ex. rel. Goldman v. Meredith, supra,* 596 F.2d at 1357. In the case at bar, plaintiff's conclusory allegation that it lacks an adequate remedy at law is belied by the fact that it has commenced proceedings in the circuit Court of Jackson county, Missouri to enforce the judgment which is presently on appeal, and has succeeded in levying upon equipment belong to defendant. As set forth in the Caruso Affidavit, (and as is acknowledged in its Memorandum in support of its own Motion, at pp. 11-12), it obtained a writ of execution, and caused the Jackson County Court Administrator to levy upon certain construction equipment. Delta then intervened in the execution proceedings, filed a motion to quash, and obtained an order from Jackson county Circuit Court establishing its ownership interest in certain equipment compelling plaintiff to return such equipment. Delta thereafter filed suit against plaintiff in the Circuit Court of Jackson County for conversion of the subject equipment. Plaintiff in turn has counterclaimed in the Delta suit alleging the making of fraudulent conveyances and transfers of property by defendant in other related entities, in violation of § 428.020 RSMo. 1986. Delta's conversion claim and plaintiff's fraudulent conveyance counterclaim are presently pending in the Circuit Court of Jackson County.

In the Memorandum in support of its Motion, at p. 12, Robertson asserts that application for title to the equipment which it improperly levied on was made by Delta in September of 1990, "after the judgment in this case and therefore clearly represented an attempt [by defendant] to shield its assets from execution." The *same equipment* is alleged in its counterclaim in the Delta action to have been conveyed to Delta "with the intent to hinder, delay or defraud [plaintiff] and other creditors of their lawful actions, damages, forfeitures, debts and demands." Thus plaintiff is already asserting a claim against Delta in state for alleged fraudulent conveyance of the same equipment which it seeks to reach in its Motion for Creditor's bill in Equity. The allegations that plaintiff lacks an adequate remedy of law is squarely refuted by plaintiff's own actions.

Clearly, plaintiff has adequate remedies at law, and is pursuing such remedies in the Circuit Court of Jackson County. Plaintiff's present attempt to call upon this Court to act with respect to the subject matter of proceedings which are already pending (and were initiated by plaintiff) in state court not only fails to show the requisite lack of adequate remedies at law, but also poses the clear and present danger of conflicting and inconsistent judicial determinations.

Plaintiff presently is the beneficiary of a judgment in it's favor. Although that judgment is presently on appeal, plaintiff insists upon its right to pursue execution during the pendency of the appeal. It is, of course, free to do so, but it need not, and should not, burden this Court with further proceedings in this case in support of those efforts. Having invoked the procedures and remedies

available to it in the Circuit Court of Jackson County, it should be remitted thereto and required to exhaust those remedies.

CONCLUSION

For all of the foregoing reasons, plaintiff's Motion for Creditor's Bill in Equity should be dismissed, without prejudice to plaintiff's right to pursue its remedies available under state law.

THE POPHAM LAW FIRM, P.C.

By: /s/ Ernest H. Fremont, Jr.
ERNEST H. FREMONT, JR. #16434
1300 Commerce Trust Bldg.
922 Walnut
Kansas City, Missouri 64106
(816) 221-2288
(816) 221-3999 – Telefax

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

A copy of the above and foregoing pleading was mailed, postage prepaid, on the 21st day of August, 1991 to: Charles A. Weiss and Douglas W. King, 500 N. Broadway, St. Louis, MO 63101; and Stephen C. Caruso, 5600 N.E. Antioch Road, Kansas City, MO 64119.

/s/ Ernest H. Fremont
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	Case
v.	)	No. 88-1059-C(6)
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	

GARNISHEE SUMMONS

TO: DICARLO CONSTRUCTION COMPANY
c/o Mitchell J. DiCarlo
5008 Prospect
Kansas City, MO 64130-2693

Any and all property of V.S. DiCarlo General Contractors, Inc.

By virtue of a Writ of Execution issued from the Office of the Clerk of the United States District Court for the Eastern District of Missouri in favor of Plaintiff H.H. Robertson Company, Cupples Products Division, and against defendant V.S. DiCarlo General Contractors, Inc., in the above-captioned cause returnable the 30th day of September, 1991, I do hereby summon you as garnishee to appear before the Honorable District Court in and for said Writ, to answer under oath such interrogatories as may be exhibited and propounded to you on the part of plaintiff touching your indebtedness to said defendant.

And I do further declare to you that I do attach in your hands all goods, chattels, monies or evidences of debts which you may have belonging to said defendant, and I do summon you as garnishee to answer therefor.

And further, I do attach in your hands all debts due to defendant, or such much thereof, as shall be sufficient to satisfy the debt, interest and cost in the above-captioned cause.

/s/ Illegible
~~WILLIAM VAUGHN~~
U.S. Marshall for the Eastern
District of Missouri

DATED: 8-30-91, 1991

Judgment Balance: $491,388.07
Interest: $ 46,474.28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	Case
v.	)	No. 88-1059-C(6)
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	

GARNISHEE SUMMONS

TO: DELTA EQUIPMENT COMPANY
c/o Mitchell J. DiCarlo
5008 Prospect
Kansas City, MO 64130-2693

Any and all property of V.S. DiCarlo General Contractors, Inc.

By virtue of a Writ of Execution issued from the Office of the Clerk of the United States District Court for the Eastern District of Missouri in favor of Plaintiff H.H. Robertson Company, Cupples Products Division, and against defendant V.S. DiCarlo General Contractors, Inc., in the above-captioned cause returnable the 30th day of September, 1991, I do hereby summon you as garnishee to appear before the Honorable District Court in and for said Writ, to answer under oath such interrogatories as may be exhibited and propounded to you on the part of plaintiff touching your indebtedness to said defendant.

And I do further declare to you that I do attach in your hands all goods, chattels, monies or evidences of debts which you may have belonging to said defendant, and I do summon you as garnishee to answer therefor.

And further, I do attach in your hands all debts due to defendant, or such much thereof, as shall be sufficient to satisfy the debt, interest and cost in the above-captioned cause.

/s/ Illegible
~~WILLIAM VAUGHN~~
U.S. Marshall for the Eastern
District of Missouri

DATED: 8-30-91, 1991

Judgment Balance: $491,388.07
Interest: $ 46,474.28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION, Plaintiff,	)	
v.	)	Case No. 88-1059-C(6)
V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	

ANSWERS TO
INTERROGATORIES TO
GARNISHEE DICARLO CONSTRUCTION COMPANY

Judgment Creditor H.H. Robertson Company, Cupples Products Division, propounds the following interrogatories to the aforesaid Garnishee:

INSTRUCTIONS

You are to answer these interrogatories in writing under oath within ten days after the return date of the writ and mail the original to:

Clerk's Office
United States District Office
1114 Market Street
St. Louis, Missouri 63101

and mail a copy to the attorney for judgment creditor:

Douglas W. King
Bryan, Cave, McPheeters & McRoberts
500 North Broadway
St. Louis, Missouri 63102

INTERROGATORIES

1. At the time of the service of garnishment, or at any time thereafter until the return date stated in the Summons of Garnishment, have you had in your possession or under your control any property, money, or effects of the judgment debtor, V.S. DiCarlo General Contractor, Inc.? If so, state what property, how much, of what value, and what money or affects?

ANSWER: No.

2. At the time of service of the garnishment, or at any time thereafter until the return date stated in the summons of garnishment, did you owe the judgment debtor, V.S. DiCarlo General Contractors, Inc., any money, or do you owe the judgment debtor any money now? If so, state what money, how much, etc. If it is not yet due, state when it will become due.

ANSWER: No.

3. At the time of service of the garnishment, or at any time thereafter until the return date stated in the summons of garnishment, will you or have you since become or are you now bound in any contract to pay the judgment debtor money not yet due? If so, state the amount to be paid out and when due any payable.

ANSWER: No.

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

The undersigned, being duly sworn, on oath states that he or she has read the foregoing interrogatories and that the answers given are true to the best of affiant's knowledge and belief.

/s/ Mitchell J. DiCarlo
Garnishee
Mitchell J. DiCarlo,
Authorized Agent

The foregoing answers were subscribed and sworn to before me on September 30, 1991.

/s/ Joyce A. Niebaum
Notary Public
Joyce A. Niebaum

My commission expires: 6/1/93

BRYAN, CAVE, McPHEETERS & McROBERTS

By _____
Charles A. Weiss
Douglas W. King
500 North Broadway
Suite 2100
St. Louis, Missouri 63102
(314) 231-8600

Attorneys for Plaintiff,
H.H. Robertson Company,
Cupples Products Division

HUSCH & EPPENBERGER

By: Alan B. Hoffman
ALAN B. HOFFMAN,
MBE #24243
100 North Broadway,
Suite 1300
St. Louis, MO 63102
(314) 421-4800

Attorneys for Garnishee
DiCarlo Construction
Company

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the completed Interrogatories was filed with the Court and copies thereof served by first-class mail, postage prepaid or hand delivery to: Douglas W. King, Bryan, Cave, McPheeters & McRoberts, 500 North Broadway, St. Louis, MO 63102; Ernest H. Fremont, The Popham Law Firm, 1300 Commerce Trust Building, 922 Walnut, Kansas City, MO 64106; and Stephen C. Caruso, 5600 N.E. Antioch Road, Kansas City, MO 64119, this 2nd day of October, 1991.

/s/ Sue Blankenship

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	Case
v.	)	No. 88-1059-C(6)
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	

ANSWERS TO
INTERROGATORIES TO
GARNISHEE DELTA EQUIPMENT COMPANY

Judgment Creditor H.H. Robertson Company, Cupples Products Division, propounds the following interrogatories to the aforesaid Garnishee:

INSTRUCTIONS

You are to answer these interrogatories in writing under oath within ten days after the return date of the writ and mail the original to:

Clerk's Office
United States District Office
1114 Market Street
St. Louis, Missouri 63101

and mail a copy to the attorney for judgment creditor:

Douglas W. King
Bryan, Cave, McPheeters & McRoberts
500 North Broadway
St. Louis, Missouri 63102

INTERROGATORIES

1. At the time of the service of garnishment, or at any time thereafter until the return date stated in the Summons of Garnishment, have you had in your possession or under your control any property, money, or effects of the judgment debtor, V.S. DiCarlo General Contractor, Inc.? If so, state what property, how much, of what value, and what money or affects?

ANSWER: No.

2. At the time of service of the garnishment, or at any time thereafter until the return date stated in the summons of garnishment, did you owe the judgment debtor, V.S. DiCarlo General Contractors, Inc., any money, or do you owe the judgment debtor any money now? If so, state what money, how much, etc. If it is not yet due, state when it will become due.

ANSWER: No.

3. At the time of service of the garnishment, or at any time thereafter until the return date stated in the summons of garnishment, will you or have you since become or are you now bound in any contract to pay the judgment debtor money not yet due? If so, state the amount to be paid out and when due any payable.

ANSWER: No.

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

The undersigned, being duly sworn, on oath states that he or she has read the foregoing interrogatories and that the answers given are true to the best of affiant's knowledge and belief.

/s/ Mark S. DiCarlo
Garnishee
Mark S. DiCarlo, Vice President

The foregoing answers were subscribed and sworn to before me on September 30, 1991.

/s/ Joyce A. Niebaum
Notary Public
Joyce A. Niebaum

My commission expires: 6/1/93

BRYAN, CAVE, McPHEETERS & McROBERTS

By _____

Charles A. Weiss
Douglas W. King
500 North Broadway
Suite 2100
St. Louis, Missouri 63102
(314) 231-8600

Attorneys for Plaintiff,
H.H. Robertson Company,
Cupples Products Division

HUSCH & EPPENBERGER

By: /s/ Alan B. Hoffman
ALAN B. HOFFMAN,
MBE #24243
100 North Broadway,
Suite 1300
St. Louis, MO 63102
(314) 421-4800

Attorneys for Garnishee
DiCarlo Construction
Company

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the completed Interrogatories was filed with the Court and copies thereof served by first-class mail, postage prepaid or hand delivery to: Douglas W. King, Bryan, Cave, McPheeters & McRoberts, 500 North Broadway, St. Louis, MO 63102; Ernest H. Fremont, The Popham Law Firm, 1300 Commerce Trust Building, 922 Walnut, Kansas City, MO 64106; and Stephen C. Caruso, 5600 N.E. Antioch Road, Kansas City, MO 64119, this 2nd day of October, 1991.

/s/ Sue Blankenship

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION, Plaintiff, vs. V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	No. 88-1059C(6)

ORDER

(Filed April 15, 1992)

Pursuant to the memorandum filed on this date herein,

IT IS HEREBY ORDERED that plaintiff's motion for creditor's bill in equity shall be and it is granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss shall be and it is denied.

Dated this 15th day of April, 1992.

/s/ George F. Gunn, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION, Plaintiff,	)	No. 88-1059C(6)
vs.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	

MEMORANDUM

(Filed April 15, 1992)

This matter is before the Court on plaintiff H.H. Robertson Company, Cupples Product Division's (Cupples) motion for creditor's bill in equity to enforce the judgment in favor of Cupples against defendant V.S. DiCarlo General Contractors, Inc. (DiCarlo), entered on July 2, 1990, in the amount of $373,039.46 on the breach of contract claim and $25,664.94 on the quantum meruit claim.[1] DiCarlo filed a notice of appeal but did not post a supersedeas bond. Accordingly, Cupples executed on DiCarlo's property to satisfy its judgment by garnishing

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[1] The Eighth Circuit Court of Appeals reversed this portion of the judgment entered on the verdict for the quantum meruit award, as well as the prejudgment interest thereon, finding that the jury instruction given for Cupples' quantum meruit claim was erroneous. *H.H. Robertson Co. v. DiCarlo General Contractors, Inc.*, No. 91-1135/1431/1783, slip op. (8th Cir. March 6, 1992).

DiCarlo's bank accounts at United Missouri Bank, Merchants Bank and Johnson County Bank in Kansas City in addition to garnishing the related DiCarlo companies and partnerships by seizing construction trailers and other vehicles belonging to DiCarlo. Cupples has also obtained a charging order on DiCarlo's interest in Rivergate Associates, a real estate partnership. These efforts resulted in the collection of $4,793.06 against the judgment. After instituting supplementary post-judgment discovery, Cupples discovered that DiCarlo claims that it has no further assets subject to execution.

Pursuant to Rule 69(a) of the Federal Rules of Civil Procedure and pursuant to the practice and procedure of the State of Missouri relating to proceedings in aid of execution, Cupples seeks a creditor's bill as the traditional means in Missouri of executing on the assets of DiCarlo's alleged alter ego corporations. Cupples asserts that after the Court entered its judgment against DiCarlo, Vince DiCarlo transferred assets sufficient to pay the judgment from him to DiCarlo Construction Company (New DiCarlo) and to Delta Equipment Company (Delta) for only fictitious consideration, thereby fraudulently defeating the Court's judgment.

Rule 69(a), Fed. R. Civ. P., provides in relevant part:

> The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Consequently this Court, in the absence of a controlling federal statute, has the same authority to aid judgment creditors in supplementary proceedings of execution as the Missouri state courts. *United States ex rel. Goldman v. Meredith*, 596 F.2d 1353, 1357 (8th Cir.), *cert. denied, Goldman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 444 U.S. 838 (1979). Missouri law therefore controls as to the procedures applicable in the judgment enforcement proceedings and the alter ego doctrine. Fed. R. Civ. P. 69(a). As explained in *United States ex rel Goldman v. Meredith*:

> In general, a creditor's bill is considered the equitable equivalent of garnishment or execution and comparable to proceedings supplementary to and in aid of execution. By the means of a creditor's bill, a judgment creditor seeks to satisfy his judgment from property of the judgment debtor which is not subject to execution. Such relief is thus appropriate only upon a showing by the judgment creditor that he has no adequate legal remedy. Missouri case law indicates that this type of equitable relief is within the general equitable jurisdiction of Missouri state courts and further that it is a remedy "as comprehensive in scope and purpose as the remedy provided by the statutory enactment in other states." (citations omitted).

United States ex rel Goldman v. Meredith, 596 F.2d at 1357. A judgment creditor may also use a creditor's bill as a means to discover the debtor's hidden assets and thereafter subject that property to the payment of the debt. *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922, 924 (Mo. Ct. App. 1989).

Cupples seeks to pierce the corporate veil of DiCarlo and hold New DiCarlo and Delta liable on the Court's judgment entered on July 2, 1990 on the basis that DiCarlo is a subterfuge and the alter ego of New DiCarlo and Delta.

Ordinarily, two separate corporations are to be treated as wholly distinct legal entities even where one corporation owns part of or all of the other corporation. However, when one corporation exercises complete dominion and control over another and such control has been used to accomplish fraud or injustice or some unlawful purpose, the separate formal corporate structures will be disregarded and the corporate veil may be pierced. *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 283-84, 286 (Mo. Ct. App. 1986) (citing *Lawton-Byrne-Bruner Ins. Agency Co. v. Stieirs Bros. Const. Co.*, 186 S.W.2d 480, 484 (Mo. Ct. App. 1945)). In such a case, the latter corporation can become a mere adjunct or alter ego of the first corporation. *Id.* at 283-84.

To pierce the corporate veil on an alter ego theory in Missouri, the moving party must show:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other

> positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 284 (quoting *National Bond Finance Co. v. General Motors Corp.*, 238 F. Supp. 248, 255 (W.D. Mo. 1964); *Radaszewski v. Contrux, Inc.*, 891 F.2d 672, 674 (8th Cir. 1989).

Applying the foregoing to this case, the Court concludes that Cupples has demonstrated that DiCarlo, New DiCarlo and Delta represent almost indistinguishable corporate entities as evidenced by their sharing the same corporate ownership, office, employees, equipment, business records and financial statements. Thus, Cupples pleaded sufficient facts to satisfy the first requirement for piercing the corporate veil. *Collet v. American Nat'l Stores, Inc.*, 708 S.W. 2d at 284.

The Court further finds that the allegations in Cupples' motion for a creditor's bill are, if true, sufficient to state a claim upon which equitable relief may be granted. The Court also finds that piercing the corporate veil of DiCarlo and holding New DiCarlo and Delta liable for this Court's judgment is appropriate under the facts of this case. DiCarlo is a subterfuge and the alter ego of New DiCarlo and Delta. This is evidenced by the DiCarlo family's exercising complete control over DiCarlo, New DiCarlo and Delta and causing the transfer of substantially all of DiCarlo's assets, employees and contracts to these two corporations without consideration. Consequently, DiCarlo was undercapitalized and unable to

meet the financial obligation owing under the subcontract with Cupples. Thus, Cupples has met the second and the third requirements for piercing the corporate veil. *Id.*

The Court therefore concludes that DiCarlo used the alleged separateness of New DiCarlo and Delta as a subterfuge to defraud Cupples from collecting on its judgment. A review of the record in this case indicates that Cupples has no adequate legal remedy available to it at this time. Accordingly, the Court will grant Cupples' requested relief so as to enforce this Court's judgment of July 2, 1990, as affirmed by the Eighth Circuit, against New DiCarlo and Delta by finding these entities serve as the alter ego of DiCarlo and are therefore subject to execution on this Court's judgment.

The Court also finds that DiCarlo's motion to dismiss is without merit. *Shockley v. Sander*, 720 S.W.2d 418, 421 (Mo.Ct. App. 1986); *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d at 924; *General Grocer Co. v. Ahlemeier*, 627 S.W.2d 61, 64 (Mo. Ct. App. 1981); *Peerless Industries, Inc. v. Estes*, 779 S.W.2d 332, 333 (Mo. Ct. App. 1989).

Dated this 15th day of April, 1992.

/s/ George F. Gunn, Jr.
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION, Plaintiff,	)	Case No. 88-1059-C(6)
v.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	

DEFENDANT'S MOTION TO VACATE THE ORDER AND MEMORANDUM DATED APRIL 15, 1992

Pursuant to Rules 59(e) and 60(b)(4) of the Federal Rules of Civil Procedure, defendant V.S. DiCarlo General Contractors, Inc. (VSDCC) respectfully prays that the Court vacate the Order entered in this action on April 15, 1992, granting plaintiff's Motion For a Creditor's Bill in Equity, and the memorandum of that date which states that the judgment of July 2, 1990 may be enforced against DiCarlo Construction Company ("DCC") and Delta Equipment Company ("Delta"). As grounds for this relief, VSDCC states:

1. Neither DCC nor Delta has ever been joined as a party in this action. Consequently, the Court lacks jurisdiction to enter any judgment against either DCC or Delta.

2. Neither DCC nor Delta has ever been afforded notice or a hearing as to the merits, if any, of plaintiff's claims against them. Consequently, any judgment against

them fails to comport with due process as required by the Fifth Amendment to the United States Constitution.

3. Plaintiff has made no attempt to state any legally cognizable claim for relief against DCC or Delta.

4. As a result, this Court has no jurisdiction to enter any order or judgment affecting the rights of DCC or Delta, and any effort to do so is plainly unconstitutional.

WHEREFORE, defendant moves the Court to vacate its Order and Memorandum dated April 15, 1992.

Respectfully submitted,

HUSCH & EPPENBERGER

By: Mark G. Arnold
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Suite 1300
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Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 28th day of April, 1992, by first class mail, postage prepaid to:

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/s/ Mark G. Arnold

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION, Plaintiff,	)	Case No. 88-1059-C(6)
v.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC., Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO VACATE ORDER AND MEMORANDUM DATED APRIL 15, 1992

V.S. DiCarlo General Contractors (VSDCC) respectfully submit this memorandum in support of its motion to vacate the order and memorandum dated April 15, 1992, with respect to the entry of a judgment against DiCarlo Construction Co. (DCC) and Delta Equipment Co. (Delta)

Introduction

The April 15 Order does not, by its terms, allow plaintiff to proceed against DCC or Delta. The Court's Memorandum, filed with the Order, states:

> the Court will grant [plaintiff's] requested relief so as to enforce this Court's judgment of July 2, 1990, as affirmed by the Eighth Circuit, against [DCC] and Delta by finding these entities serve as the alter ego of [defendant] and are therefore subject to execution on this Court's judgment.

Memorandum, at 5. In light of this language, plaintiff has started execution proceedings against DCC and Delta.

In effect, the Court has entered judgment against two entities that are not parties to this action, and over whom the Court has absolutely no jurisdiction. The Court has entered that judgment, against those entities, without ever giving them notice or an opportunity to be heard. This Order and Memorandum violate the most basic principles of due process. They are directly contrary to the controlling Supreme Court precedent in *Zenith Radio Corporation v. Hazeltine Research*, 395 U.S. 100 (1969).

Factual Background

In June 1991, plaintiff filed its "Motion for Creditor's Bill in Equity," which called upon the Court to permit it to proceed by way of a creditor's bill in equity to satisfy the judgment in this case from property of DCC and Delta. Plaintiff did not seek to join either Delta or DCC as parties to the action.

On August 21, 1991, VSDCC filed a motion to dismiss the Motion for Creditor's Bill in Equity, on the ground that the Motion failed to state a claim upon which relief can be granted; that the Motion appeared to seek relief from DCC and Delta, which were not parties to the action; and that the matters sought by plaintiff to be

raised in its Motion were the subject of other pending proceedings in the Circuit Court of Jackson County, Missouri.

On August 30, 1991, plaintiff caused garnishee summons to be issued and served, along with garnishee interrogatories, on DCC and Delta, returnable September 30, 1991. DCC and Delta filed timely answers to plaintiff's garnishee interrogatories on October 2, 1991, denying that they had any property, money or effects of the judgment debtor. No exceptions to these answers were filed within ten days' time pursuant to Rule 90.13(c), V.A.M.R.

In the April 15, 1992 Order, the Court granted the Motion for Creditor's Bill in Equity, denied VSDCC's Motion to Dismiss. The Memorandum found that:

A. The allegations in the motion, if true, were sufficient to "state a claim on which equitable relief may be granted" against DCC and Delta – even though those entities were not subject to the Court's jurisdiction.

B. Piercing the corporate veil was "appropriate," because the record indicated that plaintiff "has no adequate legal remedy available to it at this time" – even though DCC and Delta were never given any opportunity to defend those allegations.

Memorandum at 5.

Argument

The April 15 Order and Memorandum purport to enter judgment DCC and Delta, and to authorize execution against them. The Order and Memorandum are void,

because neither DCC nor Delta is a party to this action; neither was ever given notice or an opportunity to defend itself; and no claim for relief was ever stated against them. The Court lacks jurisdiction to enter judgment against non-parties – especially absent a hearing.

It is hornbook law that a judgment *in personam* does not bind a person who is not a party and on whom no process has ever been served. *Martin v. Wilks*, 490 U.S. 755, 761 (1989); *Zenith Radio Corporation v. Hazeltine Research, supra*, 395 U.S. at 110; *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). That principle absolutely precludes the entry of any order binding upon DCC and Delta without their joinder in the action.

The holding in *Zenith Radio Corporation* is directly in point. The suit was commenced as a patent infringement action by Hazeltine Research, Inc. ("HRI"), a wholly owned subsidiary of Hazeltine Corporation ("Hazeltine"). The defendant, Zenith Corporation ("Zenith"), filed a counterclaim. Hazeltine was not served with the counterclaim, and was not named as a party, although it was alleged to be a co-conspirator with HRI. HRI and Zenith entered into a stipulation that, "For purposes of this litigation plaintiff [HRI] and its parent Hazeltine Corporation will be considered to be one in the same company." On the strength of that stipulation, the District Court proceeded to enter judgment against Hazeltine, as well as HRI, notwithstanding objection that the Court lacked jurisdiction over Hazeltine. On appeal, the Supreme Court reversed:

> Perhaps Zenith could have proved and the trial court might have found that it HRI and Hazeltine were alter egos; but absent jurisdiction over Hazeltine, that determination would

> bind only HRI. If the alter ego issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here.

395 U.S. at 111.

The foregoing statement is entirely apposite to the case at bar. Indeed, the absence of jurisdiction over DCC and Delta in the case at bar is even more pronounced than in *Zenith, supra,* where the absent party was the corporate parent and sole owner of HRI. *Zenith* stands squarely for the proposition that the mere assertion that a non-party is the alter ego of a party does not remove the necessity for personal jurisdiction over the absent party, and will not permit the enforcement of a judgment against a party which was not joined in the proceedings, or afforded the opportunity to defend itself on the merits.

The service of garnishee summons and interrogatories on DCC and Delta did not confer jurisdiction over them. Under Rule 69(a), these proceedings are governed by Missouri practice and procedure. DCC and Delta filed and served verified answers to the interrogatories within ten days after the return date of the writ of garnishment, pursuant to Rule 90(b), Missouri Rules of Civil Procedure. Rule 90(c) provides that within ten days after service of the answers, "the garnishor may file exceptions to the answers, *asserting any ground upon which recovery is sought*

against the garnishee." [emphasis supplied] Rule 90(d) provides that, within ten days after service of the exceptions, the garnishee may file a response thereto. The garnishee is then entitled to a trial on the issues raised by the exceptions and response. Rule 90.13(e). The garnishor's exceptions and the garnishee's responses are the equivalent of pleadings, and the issues tried are those established by the denial and reply. *Landmark Bank of Ladue v. General Grocer Company,* 680 S.W.2d 949, 953 (Mo. App. 1984).

The plaintiff's denial of the garnishee's answers is "the foundational pleading on which his cause of action against the garnishee rests." It stands in place of the petition and like any other pleading must contain the grounds upon which recovery is sought. *Landmark Bank of Ladue v. General Grocer Company,* supra, at 953; *Rees v. Peck-King Mortgage Company,* 206 Mo. App. 690, 230 S.W. 666, 667, 668 (1921). By failing to file timely exceptions to the interrogatory answers served by DCC and Delta, plaintiff abandoned the garnishment proceeding, and the Court acquired no jurisdiction over them.

DCC and Delta have never been joined as parties to this action. No pleading asserting a claim for relief against them has ever been filed. No trial or other hearing on the merits of plaintiff's alter ego theory has occurred. An order purporting to allow plaintiff to enforce a judgment against them in this action violates elementary principles of due process of law.

CONCLUSION

In accordance with the foregoing authorities, this Court is without jurisdiction over DCC and Delta. Its Order of April 15, 1992 purporting to allow plaintiff to enforce the July, 1990 judgment against them is void and must be set aside.

Respectfully submitted,

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Attorneys for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 28th day of April, 1992, by first class mail, postage prepaid to:

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Kansas City, MO 64119

/s/ Mark G. Arnold

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	Case No. 88-1059-C(6)
vs.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	
UNITED MISSOURI BANK 1010 GRAND KANSAS CITY, MISSOURI 64141,	)	
Garnishee,	)	
DICARLO CONSTRUCTION CO.	)	
Applicant for Intervenor.	)	

MOTION TO INTERVENE

COMES NOW, Intervenor DiCarlo Construction Company pursuant to Rule 24(b), Fed.R.Civ.P. and §525.090 R.S.Mo., and for their Motion to Intervene states:

1. On or about April 21, 1992, this Court issued a Garnishee Summons to United Missouri Bank of Kansas City, N.A. pursuant to a Writ of Execution issued from the United States District Court for the Eastern District of Missouri in favor of plaintiff H.H. Robertson Company, Cupples Products Division, and against defendant V.S. DiCarlo General Contractors, Inc.

2. Garnishee United Missouri Bank has been summoned to appear and answer interrogatories as may be proposed to garnishee.

3. Pursuant to the Writ of Execution, Garnishee United Missouri Bank has placed a hold on the accounts of V.S. DiCarlo General Contractors, Inc., Delta Equipment Company and DiCarlo Construction Company.

4. This Court by its order of April 15, 1992, made certain determinations, against the existing parties in this case, that relate to the relationship between V.S. DiCarlo General Contractors, Inc., Delta Equipment Company and DiCarlo Construction Company. At the time those determinations were made, DiCarlo Construction Company and Delta Equipment Company were not parties to this action. They had never been served with summons, never been served with any pleadings, never had the opportunity to appear on any issues before the Court, and are without question not parties properly before this Court.

5. Plaintiff has garnished accounts of Delta Equipment Company and DiCarlo Construction Company and has notified customers of DiCarlo Construction Company of its right to the proceeds of certain contracts that DiCarlo performs. DiCarlo states that these actions are without support in the law, without authority from this Court, and clearly make the garnishment proceedings a nullity.

6. DiCarlo Construction Company seeks to intervene in this action because the underlying judgment, as to said intervenor is void for want of personal jurisdiction.

7. "A judgment entered without personal jurisdiction over a party is void." *Gerding v. Hawes Firearms Co.*, 698 S.W.2d 605 (Mo.App. 1985); *Gaffney v. Gaffney*, 528 S.W.2d 738 (Mo. 1975); *State ex rel. Auto Finance Co. v. Collers*, 496 S.W.2d 827 (Mo. 1973); *Row v. Cape Girardeau Foundry Co.*, 141 S.W.2d 113 (Mo.App. 1940); *Moon v. Tower Grove Bank & Trust Co.*, 658 S.W.2d 57 (Mo.App. 1983), appeal after remand, 691 S.W.2d 399 (Mo.App. 1985); *State ex rel. Clayton Greens, Etc. v. Marsh*, 634 S.W.2d 462 (Mo. 1982) (en banc).

8. DiCarlo Construction Company was never even named as a party in the above-captioned proceeding.

9. "Since in personam jurisdiction was never obtained over [DiCarlo Construction Company], the award to plaintiff . . . must be vacated." *Gaffney*, 528 S.W.2d at 742.

10. The property so attached in the hands of United Missouri Bank, are not, and were not property of the said defendant V.S. DiCarlo Construction Company, and that said V.S. DiCarlo Construction Company has and had no right, title or interest therein, but that the same property are the property of said intervenor.

11. The actions of plaintiff must surely be in plaintiff's eyes wrongful, however, said actions appear to the garnishee and to the customers of DiCarlo Construction Company to be taken under color of law.

12. As set forth in the authorities in paragraph 7 above, it is clear that this Court's actions are not binding on DiCarlo Construction Company and Delta Equipment

Company as those companies have never been summoned to appear before this Court and respond to the allegations and complaints of plaintiff.

13. Therefore, the garnishment of movant's corporate bank accounts on deposit with United Missouri Bank is wrongful and should be quashed.

WHEREFORE, intervenor DiCarlo Construction Company prays that the Court enter an Order sustaining its Motion to Intervene and that said property be delivered to Intervenor.

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/s/ Kristin L. Altice
Kevin E. Glynn MoBar#21935
Kristin L. Altice MoBar#36407

ATTORNEYS FOR INTERVENORS

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

Kristin L. Altice, of lawful age, first being duly sworn upon her oath states that the facts contained in the foregoing are true and correct according to her best information and belief.

/s/ Kristin L. Altice

Subscribed and sworn to before me this 29th day of April, 1992.

/s/ Illegible
Notary Public

My Commission Expires:
Notary Public – State of Missouri
Commissioned in Ray County
My Commission Expires
Sept. 29, 1992

I hereby certify that a copy
of the foregoing was hand delivered
this 29th day of April, to:

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	Case No. 88-1059-C(6)
vs.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	
UNITED MISSOURI BANK 1010 GRAND KANSAS CITY, MISSOURI 64141,	)	
Garnishee,	)	
DICARLO CONSTRUCTION CO.	)	
Intervenor.	)	

MOTION TO QUASH EXECUTION AND GARNISHMENT IN AID OF EXECUTION

COMES NOW, Intervenor DiCarlo Construction Co. and for its Motion to Quash Execution and Garnishment in Aid of Execution states:

1. Intervenor DiCarlo Construction Co. is a corporation organized and existing under the laws of the State of Missouri.

2. On or about April 15, 1992, this Court filed an Order and Memorandum granting plaintiff's Motion for Creditor's Bill in Equity so as to enforce this Court's

judgment of July 2, 1990 against DiCarlo Construction Company, a party not summoned before the Court in this action, by finding that it is the alter ego of defendant V.S. DiCarlo General Contractors, Inc. and therefor subject to execution on this Court's judgment.

3. Accordingly, plaintiff caused this Court to issue a Garnishee Summons to United Missouri Bank of Kansas City, N.A. pursuant to a Writ of Execution in favor of plaintiff H.H. Robertson Company, Cupples Products Division and against defendant V.S. DiCarlo General Contractors, Inc., DiCarlo Construction Company and Delta Equipment Company.

4. Intervenor has funds on deposit with United Missouri Bank in account numbers 98 7007 733 7, 98 7007 734 5, 98 7007 735 3, and 98 7031 860 1.

5. Pursuant to the Writ of Execution, Garnishee United Missouri Bank has placed a hold on the accounts of Intervenor at which time $123,172.37 was on deposit.

6. These funds are operating funds of DiCarlo Construction Company and as a result of plaintiff's improper application of the Court's Order, DiCarlo Construction Company's ability to do business is seriously affected.

7. All the funds on deposit in the above-referenced accounts are the sole and separate property of Intervenor and the accounts contained no funds which are the property of defendant.

8. Intervenor has possession of no property of any type whatsoever, belonging or owing to defendant.

9. Despite plaintiff's knowledge of DiCarlo Construction Company, intervenor corporation was *never*

named as a party in the above-captioned case throughout the pre-trial, trial, appeal and remand time frames over the last five years.

10. Intervenor corporation was never served with process in the above-captioned case nor otherwise entered an appearance in this cause since 1988.

11. Therefore, the judgment in the above-captioned case is void as to DiCarlo Construction Company because this Court had and has no jurisdiction over Intervenor in the principal action.

WHEREFORE, Intervenor DiCarlo Construction Co. prays that the Court enter an order immediately quashing the execution dated April 21, 1992; restoring the funds on deposit with Garnishee in the amount of $123,172.37 to intervenor; taxing costs against plaintiff; and awarding Intervenor a reasonable sum for its attorney's fee incurred in connection with this matter and other such relief as this Court deems appropriate.

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/s/ Kristin L. Altice
Kevin E. Glynn MoBar#21935
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ATTORNEYS FOR INTERVENORS

I hereby certify that a copy of the foregoing was hand delivered this 29th day of April, 1992 to:

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/s/ Kristin L. Altice
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H.H. ROBERTSON COMPANY, CUPPLES PRODUCTS DIVISION,	)	
Plaintiff,	)	No. 88-1059C(6)
vs.	)	
V.S. DICARLO GENERAL CONTRACTORS, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

(Filed May 11, 1992)

This matter is before the Court on V.S. DiCarlo General Contractors, Inc.'s (DiCarlo) motion to vacate the order and memorandum dated April 15, 1992 and DiCarlo Construction Company (New DiCarlo) and Delta Equipment Company's (Delta) motions to intervene and to quash execution and garnishment in aid of execution and request for emergency hearing.

New DiCarlo and Delta argue that the judgment entered on July 2, 1990, with respect to them is void for want of personal jurisdiction. Although New DiCarlo and Delta were not named as parties, were never served with summons and did not formally appear at trial, New DiCarlo and Delta, the alter ego companies of DiCarlo, were brought into this action through Cupples' creditor's bill in equity. *General Grocer Co. v. Ahlemeier*, 627 S.W.2d 61, 64 (Mo. Ct. App. 1981); *Shockley v. Harry Sander Realty*

Co., 771 S.W.2d 922, 924-25 (Mo. Ct. App. 1989); *Peerless Indus., Inc. v. Estes*, 779 S.W.2d 332, 333-34 (Mo. Ct. App. 1989). Moreover, New DiCarlo and Delta were summoned into the case by the garnishment summonses and did have the opportunity to contest the Court's jurisdiction prior to the Court's ruling on H.H. Robertson Company, Cupples Product Division's (Cupples) motion for creditor's bill in equity.

The Court also has jurisdiction over New DiCarlo and Delta by virtue of its jurisdiction over DiCarlo and its previous adjudication finding that New DiCarlo and Delta are alter egos of DiCarlo. The Court believes that the alter ego issue presented to the Court in this case is the hypothetical discussed in the Supreme Court case of *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 111 (1969).[1] Accordingly,

IT IS HEREBY ORDERED that DiCarlo's motion to vacate the order and memorandum dated April 15, 1992 shall be and it is denied.

---

[1] The Supreme Court explained in relevant part:

> Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*; but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here.

Id.

IT IS FURTHER ORDERED that New DiCarlo and Delta's motion to quash execution and garnishment in aid of execution shall be and it is denied.

IT IS FURTHER ORDERED that New DiCarlo and Delta's motion to intervene shall be and it is denied as moot.

IT IS FURTHER ORDERED that New DiCarlo and Delta's request for emergency hearing shall be and it is denied as moot.

Dated this 11th day of May, 1992.

/s/ George F. Gunn, Jr.

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2475

H.H. ROBERTSON COMPANY
CUPPLES PRODUCTS DIVISION

PLAINTIFF/APPELLEE

VS.

V.S. DiCARLO GENERAL CONTRACTORS, INC.

DEFENDANT

DiCARLO CONSTRUCTION COMPANY AND
DELTA EQUIPMENT COMPANY

INTERVENORS/APPELLANTS

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF MISSOURI

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* * *

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR CREDITOR'S BILL IN EQUITY BECAUSE THE COURT LACKED JURISDICTION TO ENTER JUDGMENT AGAINST DiCARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY.

On April 15, 1992, the trial court entered an Order and Memorandum granting plaintiff's Motion for Creditor's Bill in Equity so as to enforce the court's judgment of July 2, 1990 against DiCarlo Construction and Delta Equipment, corporations not summoned before the court, by finding that they are the alter egos of defendant V.S. DiCarlo and therefore subject to execution on the court's judgment. (Aplt.App. at 40-46). Neither DiCarlo Construction nor Delta Equipment were named as parties, served with process, or otherwise appeared in this cause. (Aplt.App. at 19-23, 58, 63-77). The trial court recognized this fatal defect in its Order entered May 11, 1992 in which it stated DiCarlo Construction Company and Delta Equipment "were not named as parties, were never served with summons and did not formally appear." (Aplt. App. at 58). The court reasoned, however, that jurisdiction was obtained through plaintiff's creditor's bill, garnishment summons, and its adjudication that the nonparties are alter egos of defendant. (Aplt.App. at 58-59). However, we cannot escape the fact that DiCarlo Construction and Delta Equipment were not named as parties, were never served with summons and did not appear in *this* action. "[O]ne is not bound by a judgment

in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

The judgment entered against these non-parties is void because the trial court had no jurisdiction over DiCarlo Construction or Delta Equipment.

> It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) (citations omitted). The proposition that a judgment of a court lacking personal jurisdiction over a party is void can be traced back to English Common-law to the late 1400's. *Burnham v. Superior Court of California*, 495 U.S. 604, 608 (1990). Before the adoption of the Fourteenth Amendment, American courts followed this common-law principle and declined to recognize judgments where jurisdiction over persons was lacking. *Id.* at 608-609. In *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878), the Supreme Court held that a judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment. Simply said, a judgment *in personam* does not bind a person who is not a party or on whom no process has even been served. *Martin v. Wilks*, 490 U.S. 755, 761 (1989).

Moreover, the law does not impose upon any person the burden of voluntary intervention. Rather, he *must* be joined. *Id.* at 763.

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief must be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Id. at 765. Since plaintiff filed this action in 1988, plaintiff has not added DiCarlo Construction or Delta Equipment as a party. Therefore, the judgment entered April 15, 1992 may not affect the legal rights of DiCarlo Construction Company or Delta Equipment Company.

* * *

CONCLUSION

For the reasons stated above, appellants DiCarlo Construction Company and Delta Equipment Company request that this Court vacate the district court's order

entered April 15, 1992 as void because the district court lacked jurisdiction over the persons of the appellants.

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/s/ Kristin L. Altice
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I hereby certify that two copies of the foregoing was mailed postage pre-paid this 14 day of Aug., 1992 to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2475

H.H. ROBERTSON COMPANY
CUPPLES PRODUCTS DIVISION

PLAINTIFF/APPELLEE

VS.

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DEFENDANT

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INTERVENORS/APPELLANTS

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES
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ATTORNEYS FOR APPELLANTS

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff H.H. Robertson Company, Cupples Products Division (hereinafter "Cupples") incorrectly used the Missouri procedure called creditor's bill in equity. Cupples failed to name DiCarlo Construction Company and Delta Equipment Company as parties, failed to serve DiCarlo Construction Company and Delta Equipment Company, and DiCarlo Construction Company and Delta Equipment Company did not enter an appearance. The District Court's Orders have the effect of allowing Cupples to execute against parties who have been denied fundamental constitutional rights. The District Court did not even allow appellants to intervene in Cupples' creditor's bill action to protect its rights.

Contrary to Cupples' hyperbole, the evidence does *not* show that V.S. DiCarlo General Contractors, Inc. engaged in any improper transactions in order to circumvent payment of Cupples' judgment. The evidence shows that as part of a proper retirement plan of V.S. DiCarlo General Contractors, Inc., the employees formed a new company under different ownership and a different name, for the operation of a new business. Thus, DiCarlo Construction Company was formed in April, 1983. Cupples does not cite sufficient evidence to show that the business activity by DiCarlo Construction Company had any improper purpose.

Due to the fact that the fundamental due process rights of appellants are at stake, oral argument of thirty minutes should be allowed for each side.

* * *

ARGUMENT

I. THE DISTRICT COURT ERRED IN ASSERTING JURISDICTION OVER DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY WHEN CUPPLES PRODUCTS DIVISION IMPROPERLY USED THE MISSOURI REMEDY OF CREDITOR'S BILL IN EQUITY BY NOT NAMING DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY AS PARTIES, BY NOT SERVING DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY WITH SUMMONS, AND WHEN DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY DID NOT OTHERWISE APPEAR, AND WHEN THE DISTRICT COURT DENIED DICARLO CONSTRUCTION COMPANY'S MOTION TO INTERVENE IN THE ACTION, AND WHEN THE EVIDENCE DID NOT DEMONSTRATE THAT DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY WERE ALTER EGOS OF V.S. DICARLO GENERAL CONTRACTORS, INC.

Cupples restates at length the general law of the Missouri remedy of creditor's bill in equity, but omits the determinative fact that unlike the successful creditors in the reported creditor's bill in equity cases, Cupples failed to name DiCarlo Construction Company and Delta Equipment Company as parties and failed to serve them with process. *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922 (Mo.App. 1989); *Peerless Industries, Inc. v. Estes*, 779 S.W.2d 332 (Mo.App. 1989); *General Grocer Co. v. Ahlemeier*, 627 S.W.2d 61 (Mo.App. 1981); *Eugene Alper*

Construction Co., Inc. v. Joe Garavelli's of West Port, Inc., 655 S.W.2d 132 (Mo.App. 1983); *Runnion v. Paquet*, 233 S.W.2d 803 (Mo.App. 1950).

In *Shockley*, creditor Frank W. Shockley sought to enforce his judgment against Harry A. Sander Realty Company by executing against Harry A. Sander individually and Middlewest Realty, Inc. The Court noted that Shockley filed the second lawsuit against Mr. Sander individually and Middlewest, naming Sander and Middlewest as parties in his initial motion for creditor's bill. *Id.*, at 923-924.

In *Peerless Industries*, creditor Peerless Industries, Inc. sought to enforce a judgment which it had obtained against Setting Sun Restaurant Corporation by filing a petition to pierce the corporate veil and execute against James R. Estes and Jack L. Maher. Mr. Estes and Mr. Maher were named as defendants in that petition.

In *General Grocer Company*, creditor General Grocer Company initially brought suit against both Fred W. Ahlemeier Company and Oakbrook Dairy Market, Inc., whom General Grocer Company contended was the alter ego of Fred W. Ahlemeier Company.

In *Eugene Alper*, creditor Eugene Alper Construction Company obtained a judgment against Joe Garavelli's of West Port, Inc. and subsequently found that the assets of the Garavelli corporation had been transferred to the personal bank account of Bernard Tureen. The Court noted that Eugene Alper Construction filed a second action, naming Bernard Tureen as a defendant. *Id.*, at 134.

Consistent with these cases, in an older case, *Runnion v. Paquet*, 233 S.W.2d 803 (Mo.App. 1950), the creditor brought a creditor's bill in equity proceeding against an insurance company, alleging that it had improperly transferred policy proceeds to the insured's employer, National Lead Company. The creditor named National Lead Company as a defendant in the initial pleading.

In contrast, in the present case, Cupples Products Division did not name DiCarlo Construction Company or Delta Equipment Company as parties in its Motion for Creditor's Bill in Equity. (Appellants' Appendix, pages 19-21). Only V.S. DiCarlo General Contractors, Inc. was named as a defendant in that action. Cupples does not contest this fact, nor did the District Court. (Appellants' Appendix, page 58). Cupples' failure to name and serve DiCarlo Construction Company and Delta Equipment Company is fatal to its creditor's bill action, as the District Court did not obtain jurisdiction over DiCarlo Construction Company and Delta Equipment Company and appellants' fundamental constitutional rights were violated by the District Court's Orders, as set forth more fully in appellants' brief.

In its brief, Cupples takes the inconsistent position that garnishment principles are inapplicable to the creditor's bill motion (page 17), while elsewhere stating that its failure to name DiCarlo Construction Company and Delta Equipment Company in the Motion for Creditor's Bill in Equity makes no difference because subsequent garnishment summons were served on DiCarlo Construction Company and Delta Equipment Company. (pages 21-22). Cupples' admission on page 17 that garnishment principles are not applicable to a creditor's bill motion

destroys Cupples' argument that its failure to name and serve DiCarlo Construction Company and Delta Equipment Company in the Motion for Creditor's Bill in Equity should be excused because a later garnishment summons was filed against DiCarlo Construction Company and Delta Equipment Company. In any event, there is no legal authority which supports Cupples' argument that its failure to name and serve DiCarlo Construction Company and Delta Equipment Company in the Motion for Creditor's Bill in Equity can be excused because a later garnishment summons was served.

On pages 26-27, Cupples argues that the fact that it served the Motion for Creditor's Bill in Equity upon *counsel* for DiCarlo Construction Company and Delta Equipment Company, without serving the motion on the parties, should constitute good service and sufficient notice. Cupples' argument is contrary to the Missouri law which states that service of initial process cannot be made upon an attorney. *Gothard v. Spradling*, 586 S.W.2d 443, 446 (Mo.App. 1979); *In re Riverfront Food and Beverage Corp.*, 29 B.R. 846 (U.S. Bankruptcy Court, E.D. Mo. 1983). Cupples strains to argue on page 27 of its brief that DiCarlo Construction Company and Delta Equipment Company were provided with notice, but it is undisputed that DiCarlo Construction Company and Delta Equipment Company were not named as parties in the Motion for Creditors Bill in Equity, were not served with that pleading, and did not receive the type of notice required by the Fifth and Fourteenth Amendments to the United States Constitution. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969).

At pages 28-32 of its brief, Cupples engages in more of the wishful thinking and unsupported argument which characterizes its Statement of the Case. As set forth in DiCarlo's Statement of the Case section in this Reply Brief, there is insufficient evidence that V.S. DiCarlo General Contractors, Inc., DiCarlo Construction Company and Delta Equipment Company were alter egos, or that any illegality, fraud or injustice occurred. All of the cases discussed by Cupples have no applicability under the facts of this case.

The District Court's Order of April 15, 1992 is in error as the District Court found an alter ego relationship by relying on the three part test in *Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo.App. 1986). (Appellants' Appendix, pages 43-44). The evidence reveals that V.S. DiCarlo General Contractors, Inc. did not exercise complete domination of DiCarlo Construction Company and Delta Equipment Company. Further, the evidence reveals that any actions taken by V.S. DiCarlo General Contractors, Inc. were not taken for a fraudulent or wrongful purpose. The District Court erred in finding that an alter ego relationship was present, and should not have applied the dicta in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969).

The District Court's application of the *Zenith* dicta was particularly inappropriate because the Supreme Court in *Zenith* stated that the non-party against whom judgment was sought needed to appear before the Court in order to make a finding of an alter ego relationship binding against the non-party. The Court stated:

> If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, *perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.* But that is not what occurred here.

Id. at 111 (emphasis added).

In this case, DiCarlo Construction Company and Delta Equipment Company did not appear and were not named and served, and even under the Supreme Court's hypothetical in *Zenith*, the District Court's Orders are in error.

II. THE DISTRICT COURT ERRED IN DENYING DICARLO CONSTRUCTION COMPANY'S MOTION TO INTERVENE BECAUSE OF THE DISTRICT COURT'S CONCLUSION THAT DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY HAD ALREADY BEEN MADE PARTIES TO THE PROCEEDINGS PURSUANT TO THE MOTION FOR CREDITORS BILL IN EQUITY, WHEN CUPPLES PRODUCTS DIVISION DID NOT NAME DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY AS PARTIES, DID NOT SERVE DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY WITH SUMMONS AND DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY DID NOT OTHERWISE APPEAR.

The District Court erred in finding that the Motion to Intervene of DiCarlo Construction Company and Delta

Equipment Company would be denied as moot. (Appellants' Appendix, page 59). The Motion to Intervene was not moot, as DiCarlo Construction Company and Delta Equipment Company had not been named as parties or served with Cupples' Motion for Creditor's Bill in Equity. DiCarlo Construction Company and Delta Equipment Company were not before the District Court and the District Court did not have jurisdiction over DiCarlo Construction Company and Delta Equipment Company. Under these circumstances, DiCarlo Construction Company and Delta Equipment Company needed to intervene in order to protect themselves, and the District Court compounded its denial of appellants' fundamental due process rights under the Fifth and Fourteenth Amendments of the United States Constitution by not even allowing appellants to intervene when faced with execution against them.

The District Court provides two reasons in its Order of May 11, 1992 for disregarding the constitutional rights of DiCarlo Construction Company and Delta Equipment Company and denying their Motion to Intervene. The District Court states that "[a]lthough New DiCarlo and Delta were not named as parties, were never served with summons and did not formally appear at trial, New DiCarlo and Delta, the alter ego companies of DiCarlo, were brought into this action through Cupples' creditor's bill in equity." (Appellants' Appendix, page 58). As explained in Appellants' Brief and in Section I of the Argument section of this Reply Brief, the District Court was incorrect as in all of the previously reported Missouri creditor's bill in equity cases, the creditor seeking to assert a judgment against a non-party named and served

the non-party in the Motion for Creditor's Bill in Equity. Cupples failed to take this fundamental step and thus any further proceedings against DiCarlo Construction Company and Delta Equipment Company in the creditor's bill in equity proceeding were void for lack of personal jurisdiction and denial of constitutional rights. Also, the District Court erred in finding that DiCarlo Construction Company and Delta Equipment Company were alter ego companies of V.S. DiCarlo General Contractors, Inc., as Cupples has failed to prove that an alter ego relationship exists under the three part test of *Collet v. American National Stores, Inc.*, 708 S.W.2d 273, 284 (Mo.App. 1986), as described in the preceding section.

The District Court provided a second reason for its Order of May 11, 1992. The Court stated "[t]he Court believes that the alter ego issue presented to the Court in this case is the hypothetical discussed in the Supreme Court case of *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 111 (1969)." (Appellants' Appendix, page 59). The District Court goes on to quote the Supreme Court's hypothetical in footnote 1. This quotation contains the language which establishes that the District Court erred. The Supreme Court stated in its hypothetical:

> If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, *perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it.* But that is not what occurred here.

Id. at 111 (emphasis added).

As set forth at the end of the previous section in this Argument, the Supreme Court recognized that the non-party could not be bound to an alter ego finding unless a non-party had appeared before judgment with full opportunity to contest jurisdiction. DiCarlo Construction Company and Delta Equipment Company did not appear, were not made parties, and were not served with the Motion for Creditor's Bill in Equity. Thus, the Supreme Court's hypothetical in the *Zenith* case does not apply, and the District Court's second reason for its Order of May 11, 1992 is in error.

Thus, through a series of decisions by the District Court, DiCarlo Construction Company and Delta Equipment Company were denied their fundamental due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. First the District Court allowed Cupples to assert a judgment against them when they had not been named as parties or served with the Motion for Creditor's Bill in Equity. The District Court allowed Cupples to continue to process the void creditor's bill case against DiCarlo Construction Company and Delta Equipment Company, and when DiCarlo Construction Company and Delta Equipment Company attempted to intervene to protect themselves, the District Court denied that request as moot. This Court should reverse the District Court's Orders to prevent a miscarriage of justice and denial of fundamental due process rights guaranteed to DiCarlo Construction Company and Delta Equipment Company by the United States Constitution.

* * *

CONCLUSION

For all of the above reasons, appellants DiCarlo Construction Company and Delta Equipment Company pray that this Court may reverse the District Court's Orders of April 15, 1992 and May 11, 1992.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2475

H.H. Robertson Company, Cupples Products Division, Plaintiff – Appellee, v. V.S. DiCarlo General Contractors, Inc., Defendant, DiCarlo Construction Company; Delta Equipment Company, Intervenors – Appellants.	* * * * * * * * * * * * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: January 13, 1993

Filed: May 28, 1993

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

DiCarlo Construction Company and Delta Equipment Company appeal from the district court's[1] order holding DiCarlo and Delta liable under a creditor's bill in equity for a judgment obtained by the Cupples Products Division of H.H. Robertson Company against a related corporation, V.S. DiCarlo General Contractors, Inc.[2] DiCarlo Construction and Delta argue that the district court lacked jurisdiction to hold them liable as garnishees under the creditor's bill because they were not named as parties in the underlying action. We affirm the district court's order.

Cupples obtained a judgment against V.S. DiCarlo in 1990. *H.H. Robertson Co. v. V.S. DiCarlo Gen. Contractors*, 789 F. Supp. 998, 999 (E.D. Mo. 1992). When Cupples attempted to enforce the judgment, it discovered that substantially all of V.S. DiCarlo's assets had been transferred to two related corporations: DiCarlo Construction and Delta. *Id.* Cupples then sought a creditor's bill in equity, a remedy available under Missouri law for judgment creditors seeking to discover and execute a judgment against a debtor's hidden assets. *Id.* In essence, Cupples asked the district court to pierce the corporate veil and hold that DiCarlo Construction and Delta were V.S. DiCarlo's "alter egos" and thus liable for the judgment against V.S. DiCarlo. *Id.* at 999-1000.

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[1] The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

[2] We refer to V.S. DiCarlo General Contractors, Inc. as "V.S. DiCarlo," to DiCarlo Construction Company as "DiCarlo Construction," and to Delta Equipment Company as "Delta."

The district court found that V.S. DiCarlo, DiCarlo Construction, and Delta were "almost indistinguishable corporate entities," that V.S. DiCarlo is "a subterfuge and the alter ego of" DiCarlo Construction and Delta, and that V.S. DiCarlo had "used the alleged separateness" of DiCarlo Construction and Delta "to defraud Cupples from collecting on its judgment."[3] *Id.* at 1000. The court granted Cupples' request for relief and denied V.S. DiCarlo's motion to dismiss the creditor's bill. *Id.* at 1001. DiCarlo Construction and Delta then tried to intervene in the case for the purpose of contesting jurisdiction on the ground that neither DiCarlo Construction nor Delta were parties to the original action. The district court denied their motion to intervene as moot. *H.H. Robertson Co. v. V.S. DiCarlo Gen. Contractors*, No. 88-1059C(6) (E.D. Mo. May 11, 1992).

The single issue on appeal is whether the district court erred in granting the creditor's bill and in enforcing the judgment against DiCarlo Construction and Delta. DiCarlo Construction and Delta argue that, because they were never named as parties in the original suit against V.S. DiCarlo, the court lacked jurisdiction over them in these post-judgment proceedings. They also argue that the garnishment summons served on them after Cupples requested the creditor's bill was insufficient notice, and that they never had a proper opportunity to contest the court's jurisdiction.

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[3] DiCarlo Construction and Delta do not dispute these factual determinations on appeal.

In the absence of a controlling federal statute, the district court "has the same authority to aid judgment creditors in supplementary proceedings as that which is provided to state courts under local law." *United States ex rel. Goldman v. Meredith*, 596 F.2d 1353, 1357 (8th Cir), *cert. denied sub nom. Goldman v. Merrill Lynch, Pierce, Fenner & Smith*, 444 U.S. 838 (1979). We have recognized the availability of the creditor's bill in equity under Missouri law. *See id.*

In Missouri, the creditor's bill enables a judgment creditor to "trace the value of the goods and services rendered to an empty-shell corporation to the parties behind such a corporation who have received and benefited from the property or services." *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922, 925 (Mo. Ct. App. 1989). In *Shockley*, the court rejected the argument that the lack of a judgment against the "alter ego" entities precluded the issuance of a creditor's bill and held instead that "the judgment required as a precursor to a creditor's bill is one against the original debtor, not against the party wrongfully in possession of the judgment debtor's assets." *Id.*

In this case, Cupples obtained a judgment against V.S. DiCarlo, who then became the "original debtor." After exhausting its legal remedies against V.S. DiCarlo, Cupples sought the creditor's bill to reach beyond the empty shell of V.S. DiCarlo to its alter egos, DiCarlo Construction and Delta. The fact that DiCarlo Construction and Delta were not themselves either judgment debtors or parties in the original action is irrelevant. The creditor's bill in equity is a specific remedy intended to address this exact situation. The holding in *Shockley*

squarely rejects any requirement that all the creditor's bill garnishees be named as parties in the original action.[4] DiCarlo's due process arguments are irrelevant here because the cases DiCarlo cites, including *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), do not discuss equitable post-judgment remedies like the creditor's bill. The district court correctly applied Missouri law in granting Cupples' request for a creditor's bill.

DiCarlo Construction and Delta also argue that they had insufficient notice of the enforcement of the judgment through the creditor's bill in equity. This argument is without merit. Cupples named DiCarlo Construction and Delta as garnishees under the creditor's bill and served both of them with a garnishee's summons on August 30, 1991. DiCarlo Construction and Delta, as garnishees, answered interrogatories on October 2, 1991. Cupples served copies of relevant pleadings describing the creditor's bill procedure on DiCarlo and Delta's counsel.[5] DiCarlo Construction and Delta had notice that they were being subjected to the creditor's bill procedure, and

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[4] DiCarlo Construction and Delta claim, without specific citation, that *Shockley* supports their argument. They accomplish this only by conflating the two published opinions in *Shockley*, misstating the procedural history of the case, and ignoring the holding cited above. *See Shockley*, 771 S.W.2d at 923-25; *Shockley v. Sander*, 720 S.W.2d 418 (Mo. Ct. App. 1986).

[5] In fact, Cupples not only served copies of these pleadings on DiCarlo Construction and Delta's counsel as indicated by their responses to the garnishee's interrogatories, but also provided copies to other attorneys presently or formerly representing the various DiCarlo corporations.

had an ample opportunity to fully present their defenses before the court's April 15, 1992 order.

Finally, because we affirm the district court's order granting the creditor's bill remedy, we also conclude that the district court did not err in denying DiCarlo Construction and Delta's motion to intervene.

We affirm the orders of the district court. A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2475

H.H. ROBERTSON COMPANY
CUPPLES PRODUCTS DIVISION

PLAINTIFF/APPELLEE

VS.

V.S. DICARLO GENERAL CONTRACTORS, INC.

DEFENDANT

DICARLO CONSTRUCTION COMPANY AND
DELTA EQUIPMENT COMPANY

INTERVENORS/APPELLANTS

PETITION FOR REHEARING OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF MISSOURI

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PETITION FOR REHEARING OF INTERVENORS/ APPELLANTS DICARLO CONSTRUCTION COMPANY AND DELTA EQUIPMENT COMPANY

In its decision of May 28, 1993, the Court overlooked or misapprehended the following points.

This Court has misapprehended the argument of DiCarlo Construction and Delta on the most crucial point of this appeal, as shown by this Court's discussion of *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922 (Mo. App. 1989). This Court states on page 4 of its decision:

> The fact that DiCarlo Construction and Delta were not themselves either judgment debtors or parties in the original action is irrelevant. The creditor's bill in equity is a specific remedy intended to address this exact situation. The holding in *Shockley* squarely rejects any requirement that all the creditor's bill garnishees be named as parties in the original action.

DiCarlo Construction and Delta have not contended that they should have been named as parties in the original action. DiCarlo Construction and Delta made the separate and distinct argument that if they were going to be subjected to creditor's bill in equity remedies, they should have been named parties and should have been served with process in the separate creditor's bill in equity action filed by Cupples in July, 1991, which was one year after the judgment was entered against V.S. DiCarlo General Contractors, Inc. This Court has misapprehended what DiCarlo Construction and Delta argued in this appeal and the holding in *Shockley* cited by this Court does not apply to DiCarlo Construction and Delta's arguments.

In every other reported Missouri case involving the creditor's bill in equity remedy, when the plaintiff filed its creditor's bill in equity proceeding following the judgment, the plaintiff named the person against whom the plaintiff sought to collect the judgment as a party. Cupples did not do so in this case as DiCarlo Construction and Delta were never named as parties to Cupples' 1991 creditor's bill in equity proceeding.

The plaintiff in *Shockley* followed that procedure, as Shockley first obtained the judgment against Harry Sander Realty Co., and then filed a second action, a creditor's bill in equity action, naming Harry Sander as an individual and Middlewest Realty Co. as parties. DiCarlo Construction and Delta merely wish to have the same rights which were afforded Harry A. Sander and Middlewest Realty Co. in the *Shockley* case. This Court is under the misapprehension that DiCarlo Construction and Delta argued that the creditor's bill in equity proceeding should not apply to them because they were not judgment debtors or parties to the original action, but that is not the argument of DiCarlo Construction or Delta. As this Court's decision of May 28, 1993 is based upon that misapprehension, this is truly a case in which rehearing is manifestly appropriate.

This Court has also misapprehended the due process arguments of DiCarlo Construction and Delta and has overlooked the federal law on this issue. This Court states at page 4 that "DiCarlo's due process arguments are irrelevant here because the cases DiCarlo cites, including *Zenith Radio v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), do not discuss equitable post-judgment remedies like the

creditor's bill". DiCarlo Construction and Delta have simply argued that fundamental due process rights should be safeguarded in separate actions on creditor's bill in equity. Contrary to this Court's statement, post-judgment remedies must satisfy due process safeguards. *McCahey v. L.P. Investors*, 774 F.2d 543, 547-9 (2nd Cir. 1985); *Kirby v. Sprouls*, 722 F. Supp. 516, 519-20 (C.D. Ill. 1989). Among the fundamental rights guaranteed every person is the right to refuse to voluntarily intervene in a lawsuit in which one has not been named as a party or served with process. *Martin v. Wilks*, 490 U.S. 755, 763-765 (1989). There is no reason why persons affected by a creditor's bill in equity action should be carved out as a separate and distinct class for whom the fundamental due process rights under the United States Constitution do not apply.

This Court continues its discussion of notice by stating that Cupples served DiCarlo Construction and Delta with a garnishees' summons on August 30, 1991 and that DiCarlo Construction and Delta answered garnishment interrogatories on October 2, 1991. This Court has overlooked the Missouri law which states that the service of garnishment interrogatories and the answers to garnishment interrogatories do not create a cause of action against the garnishee. To create a valid cause of action against the garnishee, the plaintiff must file exceptions to the garnishment interrogatory answers, which Cupples failed to do in this case. *Landmark Bank of Ladue v. General Grocers Co.*, 680 S.W.2d 949, 953 (Mo. App. 1984).

This Court also overlooks Missouri law in stating that Cupples served copies of relevant pleadings describing the creditor's bill procedure on DiCarlo and Delta's counsel, as service on counsel alone is insufficient if

service has not been made on the party itself. *Gothard v. Spradling*, 586 S.W.2d 443, 446 (Mo. App. 1979); *In re Riverfront Food and Beverage Corp.*, 29 B.R. 846 (U.S. Bankruptcy Court, E.D. Mo. 1983).

This Court has further overlooked the strenuous objections of DiCarlo Construction and Delta to Cupples' arguments that V.S. DiCarlo General Contractors, Inc., Delta and DiCarlo Construction were alter egos. This Court states at page 2 of its decision that DiCarlo Construction and Delta do not dispute the factual determinations that V.S. DiCarlo General Contractors, Inc., DiCarlo Construction Company and Delta Equipment Company were "almost indistinguishable corporate entities", and V.S. DiCarlo General Contractors, Inc. is "a subterfuge and the alter ego of" Delta and DiCarlo Construction, and that V.S. DiCarlo General Contractors, Inc. has "used the alleged separateness" of DiCarlo Construction and Delta to "defraud Cupples from collecting on its judgment". In fact, Delta and DiCarlo Construction disputed these factual determinations on pages 1-13, 18 and 21 of their Reply Brief. The record as a whole, as described in the Reply Brief, shows that there is no factual merit to Cupples' contentions. For example, the record shows that DiCarlo Construction Company was created in 1983, several years before Cupples filed suit. On December 31, 1986, V.S. DiCarlo General Contractors, Inc. ceased its operations. At that time, there was no way for V.S. DiCarlo General Contractors, Inc., Delta or DiCarlo Construction to know that they would ever have litigation with Cupples or that a judgment would ever be entered against V.S. DiCarlo General Contractors, Inc. The record further shows that the majority owner of V.S. DiCarlo

General Contractors, Inc. owns no stock personally in DiCarlo Construction Company or Delta. He has never been an officer or director of DiCarlo Construction Company or Delta Equipment Company. DiCarlo Construction and Delta contest as forcefully as possible the allegations that there was ever any fraud, improper behavior or alter ego relationships between V.S. DiCarlo General Contractors, Inc., Delta or DiCarlo Construction.

This Court overlooks the fact that when the District Court entered its decision finding that V.S. DiCarlo was an alter ego of DiCarlo Construction and Delta, DiCarlo Construction and Delta had not been named as parties to Cupples' Motion for-Creditor's Bill in Equity action, had not been served and had not voluntarily entered any appearance in that action, as was their right pursuant to *Martin v. Wilks*, 490 U.S. 755, 763-5 (1989). Following the entry of the District Court's Order of April 15, 1992, DiCarlo Construction and Delta sought to intervene in Cupples' Motion for Creditor's Bill in Equity action to present its position on these points, but the District Court denied their request. This Court has overlooked this entire procedural history in affirming the District Court's determination on the Motion to Intervene.

In summary, this Court's decision of May 28, 1993 is based on a fundamental misapprehension of the argument of DiCarlo Construction and Delta. Thus, this Court has departed from all of the prior Missouri law of actions for creditor's bill in equity and has created a new doctrine, that in the separate creditor's bill in equity proceeding, filed after the judgment, the plaintiff does not have to name as parties those individuals or entities

against whom the plaintiff wishes to execute. This holding by this Court is contrary to every prior Missouri creditor's bill in equity decision. This Court has also created new constitutional law by stating that post-judgment procedures such as a creditor's bill in equity action do not need to contain any constitutional due process safeguards.

WHEREFORE, Appellants DiCarlo Construction Company and Delta Equipment Company pray that this Court may grant their Petition for Rehearing.

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July 13, 1993

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Re: 92-2475EMSL H.H. Robertson Co. vs. V.S. DiCarlo

Dear Counsel:

Enclosed is a copy of an order entered today in the above case at the direction of the court.

Sincerely,

/s/ Michael E. Gans
Michael E. Gans
Clerk of Court

mam

Enclosure(s)

cc: Hon. George F. Gunn Jr.
Douglas W. King
Charles A. Weiss
Jeffrey J. Kalinowski
William Dirk Vandever
Kristin L. Altice

District Court/Agency Case Number(s): 88-1059-C(6)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2475EMSL

H.H. Robertson Company, Cupples Products Division, Appellee,	* * * * *	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
DiCarlo Construction Co., et al, Appellants.	* * * *	

The petition for rehearing filed by the appellant has been considered by the court and is hereby denied.

July 13, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

MISSOURI RULES OF CIVIL PROCEDURE

RULE 90.13 INTERROGATORIES TO GARNISHEE – ANSWERS TO INTERROGATORIES – EXCEPTIONS – RESPONSE – ISSUES TRIED

(a) Interrogatories – Time for Filing – Service. Prior to the issuance of the summons of garnishment, the garnishor shall file written interrogatories asking the garnishee to state the property subject to garnishment in his possession or charge or under his control. The interrogatories shall be served simultaneously with the summons of garnishment.

(b) Answers to Interrogatories – Time for Filing. The garnishee shall file and serve his verified answers to the interrogatories within ten days after the return date of the writ.

(c) Exceptions to Answers to Interrogatories – Time for Filing. Within ten days after service of the answers, the garnishor may file exceptions to the answers asserting any ground upon which recovery is sought against the garnishee.

(d) Response to Exceptions – Time for Filing. Within ten days after service of the exceptions, the garnishee may file a response thereto.

(e) Issues Tried. The issues tried shall be those raised by the exceptions and response.

Supreme Court, U.S.
FILED
NOV 12 1993
OFFICE OF THE CLERK

NO. 93-583

In the
Supreme Court of the United States
October Term, 1993

DiCARLO CONSTRUCTION COMPANY, and
DELTA EQUIPMENT COMPANY,

Petitioners,

v.

H.H. ROBERTSON CO.,
CUPPLES PRODUCTS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Did the district court properly assert jurisdiction over petitioners to subject them to execution on the judgment against the defendant in this case when (i) petitioners were summoned into the proceedings below pursuant to the traditional equitable remedy available under Missouri law of a creditor's bill in equity, (ii) petitioners were served with process by the United States Marshal, (iii) petitioners were afforded ample opportunity to respond to the claims against them, and (iv) the district court found as a matter of fact that petitioners were the alter egos of the defendant, which routinely disregarded their alleged separateness, engaged in numerous sham transactions, and conspired to defraud respondent from collecting its judgment?

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NO. 93-583

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v.

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case fails to recite any of the facts upon which the district court relied in piercing the corporate

veil and permitting respondent to enforce the judgment against petitioners. It also neglects to describe fully the traditional equitable procedure by which petitioners were subjected to enforcement of the judgment. It further overlooks the fact that petitioners were accorded due process, including service of process, notice of the proceeding, and an opportunity to participate in the proceeding. Accordingly, we will briefly recite the facts necessary to place the petition in proper perspective.

Respondent is H.H. Robertson Company, Cupples Products Division ("Cupples").[1/] Cupples obtained a subcontract in 1986 to supply and install the curtain wall (*i.e.*, the exterior facing) for an office building in Kansas City called Two Pershing Square. The subcontract was with defendant V.S. DiCarlo General Contractors, Inc. ("Old DiCarlo"), which acted as the general contractor for Two Pershing Square, although it had no contract at all with the project owner. Unbeknownst to Cupples, the owner's contract was with a related company, petitioner DiCarlo Construction Company ("New DiCarlo"). A third related company, petitioner Delta Equipment Company ("Delta"), purported to supply equipment to Old DiCarlo and New DiCarlo on the project.

After Cupples completed the work required under its subcontract, Old DiCarlo refused to pay the final contract retention. Cupples filed suit against Old DiCarlo in the district court, and Old DiCarlo counterclaimed for alleged delay damages. The jury returned verdicts for Cupples on its claims and on the counterclaim, and the district court entered judgment against Old DiCarlo (Pet. App. 1-2).

1/ Pursuant to Supreme Court Rule 29.1, respondent states that it has merged with the Ceco Corp. and is now known as Robertson-Ceco Corp. It has no parent corporation or subsidiary corporations that are not wholly owned.

Old DiCarlo appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment on the principal count and reversed and remanded on a second, minor count. *See* 950 F.2d 572 (8th Cir. 1991). Cupples subsequently dismissed the remanded claim. Old DiCarlo did not seek this Court's review of the judgment as modified by the court of appeals.

During that first appeal, Old DiCarlo failed to post a supersedeas bond. Consequently, Cupples attempted for two years to execute on the judgment. Cupples caused the issuance of the numerous writs of execution, garnishments, and charging orders. It also seized and sold property belonging to Old DiCarlo. All these efforts resulted in the collection of less than one percent of the judgment. In response to post-judgment discovery, Old DiCarlo claimed that it had no further assets subject to execution.

Once Cupples had exhausted the legal means of execution available to it against Old DiCarlo, it commenced proceedings in the district court to permit it to enforce the judgment against the two alter ego companies of Old DiCarlo, *i.e.*, the present petitioners, New DiCarlo and Delta. Cupples elected to take advantage of a highly flexible equitable remedy available under Missouri law called a creditor's bill in equity, which was applicable in the district court under Fed. R. Civ. P. 69. *See, e.g., United States ex rel. Goldman v. Merideth*, 596 F.2d 1353, 1357 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979).

Cupples filed its motion for a creditor's bill in equity on July 1, 1991 (Pet. App. 3-5), together with a detailed memorandum of law and extensive evidentiary support. The motion, memorandum, and evidentiary support were served on counsel for Old DiCarlo, New DiCarlo, and Delta (*Id.* at 4-5).

Old DiCarlo filed a motion to dismiss the creditor's bill proceeding on August 21, 1991, observing that "a creditor's bill is considered the equitable equivalent of garnishment or execution" (*Id.* at 12). Old DiCarlo argued that, in prior cases, "plaintiff joined the alleged alter egos as garnishees and was allowed to proceed against them as such in equity under a creditor's bill" (*Id.* at 13).

Cupples then caused New DiCarlo and Delta to be served by the United States Marshal with garnishment summonses and interrogatories to join them formally as parties to the equitable execution proceeding (*Id.* at 17-20). Cupples also filed memoranda expressly stating that the purpose of the garnishments was to add New DiCarlo and Delta as parties to the creditor's bill proceeding and that the purpose of that proceeding was to hold them subject to execution on the judgment as the alter egos of Old DiCarlo. These memoranda were served on all five counsel who at various times had represented Old DiCarlo, New DiCarlo, and Delta in the post-judgment proceedings.

New DiCarlo and Delta filed answers to the garnishment interrogatories on October 2, 1991, denying that they held any assets of Old DiCarlo subject to execution on the judgment (*Id.* at 21-28). Cupples then filed another memorandum with the district court to demonstrate that the procedural aspects of the motion for a creditor's bill had been satisfied since the court could treat the previously filed motion for a creditor's bill as taking issue with the denials in the garnishment interrogatory answers, if that were considered necessary, under Missouri garnishment procedure. This memorandum, which was again served on all five lawyers who had represented Old DiCarlo, New DiCarlo, and Delta, clearly advised all these parties that New DiCarlo and Delta needed to respond to the creditor's bill motion.

The district court granted the motion for a creditor's bill, pierced the corporate veil, and held New DiCarlo and Delta subject to execution on the judgment against Old DiCarlo in an order and memorandum dated April 15, 1992 (*Id.* at 29-35). It also denied Old DiCarlo's motion to dismiss.

The district court found as a fact that "DiCarlo, New DiCarlo, and Delta represent almost indistinguishable corporate entities as evidenced by their sharing the same corporate ownership, office, employees, equipment, business records and financial statements" (*Id.* at 34). The court further found: "DiCarlo is a subterfuge and the alter ego of New DiCarlo and Delta. This is evidenced by the DiCarlo family's exercising complete control over DiCarlo, New DiCarlo and Delta and causing the transfer of substantially all of DiCarlo's assets, employees and contracts to these two corporations without consideration" (*id.*). Furthermore, the court found that "DiCarlo was undercapitalized and unable to meet the financial obligation owing under the subcontract with Cupples" (*Id.* at 34-35). Consequently, the court concluded "that DiCarlo used the alleged separateness of New DiCarlo and Delta as a subterfuge to defraud Cupples from collecting on its judgment" (*Id.* at 35).

Once the district court entered its order piercing the corporate veil, Cupples commenced execution proceedings against the assets of New DiCarlo and Delta on April 21, 1992. Old DiCarlo filed a motion to vacate the district court's order, and New DiCarlo filed a motion to quash the execution. Delta did not file any motion.

The district court considered the motions filed by Old DiCarlo and New DiCarlo on their merits and denied both of them in a memorandum and order dated May 11, 1992 (*Id.* at 54-56). Having considered New DiCarlo's motion to quash on its merits and having concluded that New DiCarlo and Delta had already

been made parties to the execution proceedings, the district court further denied New DiCarlo's motion to intervene as moot (*Id.* at 56).

New DiCarlo and Delta appealed the district court's orders to the Eighth Circuit on June 6, 1992. This time, they posted a supersedeas bond. The court of appeals affirmed the orders of the district court in an opinion reported at 994 F.2d 476 (8th Cir. 1993) (Pet. App. 74-79). It ruled that the district court possessed jurisdiction over New DiCarlo and Delta because Cupples adhered to the procedures required under the Missouri cases relating to the traditional equitable remedy of the creditor's bill (*Id.* at 77-78). The court of appeals also ruled that due process was satisfied because New DiCarlo and Delta had sufficient notice of the nature of the proceedings against them and "had an ample opportunity to fully present their defenses before the [district] court's April 15, 1992 order" (*Id.* at 79). The Eighth Circuit further denied New DiCarlo and Delta's petition for rehearing on July 13, 1993.

New DiCarlo and Delta applied to the Eighth Circuit for a stay of its mandate pending their application for certiorari, but the court of appeals denied that motion and issued its mandate on July 20, 1993. New DiCarlo and Delta the applied to this Court for a stay pending review on certiorari, but Justice Blackmun denied that application on July 26, 1993.

Cupples commenced proceedings in the district court to enforce the judgment against the surety on the supersedeas bond, but New DiCarlo and Delta instead paid the judgment themselves. The parties filed a satisfaction of judgment in the district court on August 26, 1993.

REASONS WHY THE WRIT SHOULD BE DENIED

The issue which petitioners ask this Court to examine is not presented by this case. Contrary to the assertion of the petition, the court of appeals never stated that procedural due process was irrelevant to post-judgment collection proceedings. Rather, the court of appeals held that petitioners had received due process since the district court followed a traditional equitable post-judgment remedy available under Missouri law and afforded petitioners ample notice and opportunity to present their defenses. In addition, this case presents no conflict among the circuits and no question of general importance, and it turns entirely upon its peculiar facts.

I. The Issue of the Applicability *Vel Non* of Procedural Due Process Requirements to Post-Judgment Collection Proceedings is Not Presented in this Case Because the Court of Appeals Never Held that Due Process was Inapplicable; It Actually Held that Due Process Had Been Satisfied.

Petitioners have asked the Court to grant certiorari in this case in order to overrule this Court's prior decision in *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924). However, neither the district court nor the court of appeals relied upon or even cited *Endicott-Johnson*. In fact, petitioners did not cite *Endicott-Johnson* in their opening brief, reply brief, or petition for rehearing in the court of appeals. The *Endicott-Johnson* decision is, therefore, entirely irrelevant to the opinion below. Under Supreme Court Rule 15, Cupples must advise the Court that this issue would not be presented for its review if certiorari were granted.

Petitioners are plainly incorrect in their assertion that "this case squarely presents the issue of whether a state's equitable post-judgement collection procedure may contain no due process safeguards, ..." (Pet. 7). The reason the court of appeals never cited *Endicott-Johnson* was that the court never suggested that due process requirements were inapplicable. Instead, the court of appeals held that the district court's proceedings fully complied with due process because petitioners had received clear notice of the nature of the claims against them and had been afforded ample opportunity to respond to those claims.

Petitioners made two arguments in the court of appeals. First, they contended that the district court lacked jurisdiction over them because they had not been made parties prior to the judgment against Old DiCarlo. Second, they asserted that they had received insufficient notice of the creditor's bill proceeding and had no opportunity to contest it.

As to the first argument, the court of appeals correctly held that Missouri law recognizes the traditional equitable remedy of a creditor's bill, and the creditor's bill procedure specifically authorized Cupples to initiate the creditor's bill proceeding by post-judgment motion in the original lawsuit and to join the alter ego corporations as garnishees in that proceeding. *United States ex rel. Goldman v. Meredith*, 596 F.2d 1353, 1357 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979); *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922, 925 (Mo. App. 1989); *see also Shockley v. Sander*, 720 S.W.2d 418 (Mo. App. 1986).

In this connection, the court of appeals observed (Pet. App. 78) that the cases cited by petitioners in support of their contention that they should have been added as parties *before* the judgment were irrelevant because they failed to discuss the considerable body of case law allowing the joinder of such alter ego corporations as garnishees in post-judgment proceedings such

as the creditor's bill. The court never suggested that due process concerns did not apply in such proceedings.

With regard to petitioners' second argument, the district court and the court of appeals found as a fact that petitioners had sufficient notice because they were named as garnishees on the creditor's bill, served with garnishee summonses, answered the garnishment interrogatories, received all of the relevant pleadings, and had an ample opportunity to present their defenses before the district court's order piercing the corporate veil (Pet. App. 55, 78-79). Contrary to petitioners' assertion (Pet. 10-11), the court of appeals never held that notice was sufficient "because Cupples mailed the garnishment interrogatories to counsel" for petitioners. Instead, the Eighth Circuit concluded that petitioners had been made parties to the post-judgment proceedings when the United States Marshal served them — not their counsel — with process, including garnishment summonses as well as the interrogatories.

Petitioners also misstate the record when they assert several times that they were "never named as parties or served with process" in the creditor's bill proceeding (*e.g.*, Pet. 8). They were named as garnishees in the motion and related pleadings and served with summonses by the United States Marshal. The very Missouri cases cited in the petition make clear that joining such additional parties as garnishees is the proper procedure to subject them to the creditor's bill proceeding. *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922 (Mo. App. 1989); *Peerless Industries, Inc. v. Estes*, 779 S.W.2d 332 (Mo. App. 1989). This procedure is perfectly consistent with due process. The district court found, for example, that this procedure represented the very hypothetical situation suggested by this Court for asserting jurisdiction over alter ego corporations in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969). *See* Pet. App. 55.

Finally, the argument, based on *Martin v. Wilks*, 490 U.S. 755 (1989), that the court of appeals suggested that petitioners should have voluntarily intervened in the action is nonsense. Petitioners eventually did move to intervene, and the district court *denied* that motion as moot. The court of appeals affirmed the district court's view that petitioners had already been made parties by the U.S. Marshal's service of the garnishment summonses and their appearance in the case through counsel in response to those summonses.

II. This Case Presents No Conflict Among the Circuits and No Question of General Importance, Turns Entirely Upon Its Own Facts, and May Be Moot.

Petitioners cite four decisions from the First, Second, Third, and Tenth Circuits which address whether federal due process protections should be applied in post-judgment collections proceedings (Pet. 5-6). As we have demonstrated above, however, the Eighth Circuit's decision here assumed that due process applied and held that it was satisfied. Therefore, there is no inter-circuit conflict for this Court to resolve.

There is, likewise, no question of general importance in this case. The merits of the dispute were resolved on a prior appeal and are not presented for review here. This case is now nothing but a collection action. Under Fed. R. Civ. P. 69, the district court applied Missouri state procedures on enforcement of judgments. The creditor's bill proceeding presents only obscure questions of Missouri equity procedure. It would be a waste of this Court's resources to grant certiorari simply to construe, as petitioners desire (Pet. 10), the requirement of garnishment exceptions under Missouri Rule 90.13. In any event, that rule does not strictly apply since the proceedings below were not an

ordinary garnishment at law but rather an equitable creditor's bill, part of which required summoning petitioners as garnishees.

Granting certiorari would also be inappropriate because this Court would have to address whether this case has become moot on appeal. Voluntary payment of a judgment ordinarily renders an appeal from that judgment moot. *Railroad Co. v. Commissioners*, 98 U.S. 541, 543-44 (1879); *see also Cahill v. New York, N.H. &* H.R. Co., 351 U.S. 183, 190 (1956) (Black, J., dissenting). Although Cupples had filed a motion to enforce the liability of the surety on the supersedeas bond, no execution of any kind was outstanding against petitioners when they paid the judgment. Thus, this Court might have to conclude that petitioners paid the judgment voluntarily and not under duress, thereby rendering the petition moot.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

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DICARLO CONSTRUCTION COMPANY, and
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CUPPLES PRODUCTS DIVISION,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S "REASONS WHY THE WRIT SHOULD BE DENIED"

I. This Case Presents Important Procedural Due Process Issues

Respondent illogically argues that because the Court of Appeals mentioned due process principles and suggested that the due process rights were not violated, this Court may not review the Court of Appeals' decision. The situation is not as clear as respondent represents. The Court of Appeals states that due process arguments are irrelevant in the context of equitable post-judgment remedies (Appendix, page 78), yet without further explanation discusses notice issues in the next paragraph (Appendix, pages 78-79). This Court is not foreclosed from reviewing the Court of Appeals' decision. Obviously, this Court often reviews cases in which it disagrees with the decisions of lower courts as to whether due process rights have been violated in particular circumstances.

Respondent makes much of the fact that *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924) was not cited in the lower courts. There was no reason to cite it below. Petitioners had no way of knowing in advance that the Court of Appeals' decision would state that due process arguments are irrelevant (Appendix, page 78). Petitioners had no reason to suspect that this case would involve the fundamental question of the applicability of due process rights in equitable post-judgment collection procedures, or that the Eighth Circuit Court of Appeals would deviate from the decisions of the First, Second, Third and Tenth Circuits mentioned in the Petition for a

Writ of Certiorari. Petitioners argued and preserved due process issues in the lower courts at several points (Appendix, pages 38-44, 57-73, 80-87).

At page 8, respondent misstates petitioners' argument. Petitioners' position is that they should have been named as parties and served as process *after* the judgment was entered against V.S. DiCarlo General Contractors, Inc., during the equitable post-judgment collection procedure.

Respondent states on page 9 that due process was satisfied because petitioners were served with garnishee summonses. Banks and other financial institutions receive garnishee summonses all the time from creditors seeking to discover assets of debtors. The mere fact that DiCarlo Construction Company and Delta Equipment Company received garnishee summonses means nothing without further pleadings under Missouri Rule of Civil Procedure 90.13, which respondent did not follow.

Respondent states on page 9 that the District Court found that the procedure followed in this case was consistent with the hypothetical situation suggested in *Zenith Radio Corp v. Hazeltine Research*, 395 U.S. 100, 111 (1969). The procedure in this case does not follow the hypothetical situation in *Zenith:*

> Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos;* but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction

> over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest jurisdiction would warrant entry of judgment against it. But that is not what occurred here. *Id.*, at 111.

This hypothetical does not apply to this case because DiCarlo Construction Company and Delta Equipment Company did not have the opportunity to litigate the alter ego issue before judgment (or after judgment) to present their position.

II. Petitioners' Payment of A Judgment Does Not Render This Case Moot

Respondent incorrectly states that this case may be moot because petitioners have satisfied the judgment. Payment of a judgment does not foreclose an appeal and does not render an appeal moot. *Graddick v. Newman*, 453 U.S. 928, 929 n. (1981); *Elkin v. Fauver*, 969 F.2d 48, 53 n.4 (3rd Cir. 1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 473 (1992); *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Constr. Co.*, 745 F.2d 595, 598 (9th Cir. 1984).

In the case cited by respondent, *Railroad Co. v. Commissioners*, 98 U.S. 541 (1879), the railroad company voluntarily paid disputed taxes when no judgment had been entered. In contrast, DiCarlo Construction Company and Delta Equipment Company paid and satisfied the judgment only after the Court of Appeals denied their Petition for Rehearing on July 13, 1993, and after both the Court of Appeals and this Court denied their application

for a stay pending review on certiorari. (Respondent's Brief in Opposition, page 6).

Respondent also states that there is no inter-circuit conflict for this Court to resolve because the Court of Appeals for the Eighth Circuit stated that due process had been satisfied. An inter-circuit conflict exists because the Eighth Circuit acknowledged the existence of due process principles, but stated that they are irrelevant to equitable post-judgment remedies (Appendix, page 78), unlike the First, Second, Third and Tenth Circuits, which recognized the applicability of due process to post-judgment collection procedures.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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